Petition

81-1063

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA AND
ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE SERVICE AGENT, PETITIONERS

v.

GEORGE W. MEEKS, AS PRESIDENT,
ST. GEORGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a respondent in a civil contempt proceeding, who has failed to obey a final order of the court directing him to comply with an Internal Revenue Service summons, may sustain his burden of establishing an inability to comply by submitting an uncross-examined statement that he does not have the summoned documents and asserting his Fifth Amendment privilege against self-incrimination.

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UNITED STATES OF AMERICA AND
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v.

GEORGE W. MEEKS, AS PRESIDENT,
ST. GEORGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America and Albert Rodriguez, Jr., Internal Revenue Service Agent, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 3a-28a) is reported at 642 F.2d 733. The order of the district court holding respondent in contempt (App. D, *infra*, 31a-32a) and the district court's findings of fact and conclusions of law (App. E, *infra*, 33a-37a) are not reported. Prior orders of the district court (Apps. F, G, H, *infra*, 38a-43a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a-2a) was entered on February 10, 1981 and explanatory opinions were issued on April 17, 1981 (App. B, *infra*, 3a-28a). A petition for rehearing was denied on July 10, 1981 (App. C, *infra*, 29a-30a). On September 24, 1981, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including December 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

26 U.S.C. 7402(b) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

STATEMENT

On June 12, 1979, in connection with a civil investigation of the federal income tax liabilities of the St. George Company for the years 1977 and 1978, a summons was issued to respondent, George Meeks, as president of the company.[1] That summons called for respondent to testify and to produce corporate records and books (see App. D, *infra*, 31a-32a). Respondent failed to comply; instead, he brought several corporate documents to a meeting with In-

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[1] For fiscal year 1977, respondent, as president of St. George Company, submitted a corporate tax return which furnished no information; instead, in response to each line item on the form, reference was made to an attachment which stated (Oct. 30, 1979 Tr. 50):

> I refuse to provide this information on the grounds that this information could be used to incriminate me and subject me to perjury prosecution; said prosecution to be initiated solely as a result of the subjective interpretation by the Internal Revenue Service.

This document was sent to the Internal Revenue Service (IRS) along with a check in the amount of $1,187.31 (*ibid.*). No explanation was provided of how that amount was calculated (*id.* at 51). The record does not reflect that St. George Company made any submission to the IRS for fiscal year 1978.

The civil investigation of the company's tax liabilities commenced in early 1979. The summons was issued after the IRS made several fruitless efforts to secure respondent's voluntary cooperation. Respondent cancelled or postponed all scheduled meetings with the IRS agent (Oct. 30, 1979 Tr. 39-40).

("Oct. 30, 1979 Tr." refers to the transcript of a hearing in the district court on October 30, 1979; "Sept. 13, 1979 Tr." refers to the transcript of respondent's appearance before IRS agents on September 13, 1979; "Nov. 10, 1980 Tr." and "Nov. 25, 1980 Tr." refer to transcripts of the contempt hearing in the district court on November 10, 1980, and November 25, 1980, respectively.)

ternal Revenue Service agents but refused to disclose them—or any of the "boxes and boxes" of documents he stated were in his office—unless he was granted personal transactional immunity (Oct. 30, 1979 Tr. 8, 15, 27; see App. B, *infra*, 4a, 11a-14a). Immunity was not granted and the petitioners commenced an action in the United States District Court for the Western District of Texas to enforce the summons pursuant to 26 U.S.C. 7402(b) and 7604(a).

On August 21, 1979, the district court entered an enforcement order and directed respondent to appear before the IRS to testify about the corporation's tax liability and to produce the corporate records (Apps. F, G, *infra*, 38a-41a; App. B, *infra*, 4a, 14a). In response, Meeks appeared and produced approximately 20 pages of documents, including Employer's Quarterly Federal Tax Returns, copies of which were already in the possession of the IRS (Oct. 30, 1979 Tr. 44-48; see App. B, *infra*, 4a, 14a). He claimed that some documents could be obtained or reconstructed, but that other documents were not in his possession (Oct. 30, 1979 Tr 87-88; Sept. 13, 1979 Tr. 13-15, 17-24, 31-32, 35-37; see App. B, *infra*, 4a, 14a-17a). Further, he asserted his Fifth Amendment privilege against self-incrimination to inquiries concerning the whereabouts of the documents (Sept. 13, 1979 Tr. 9, 11-12; Oct. 30, 1979 Tr. 89-91; see App. B, *infra*, 14a).[2]

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[2] Respondent's only other attempt to comply occurred one year later, when, at another meeting with IRS agents, he agreed to sign waivers enabling the IRS to request bank records relating to St. George Company. However, even this minimal effort was soon negated. When the waivers were sent to him, respondent altered the beginning and ending dates, rendering the forms unacceptable (Nov. 10, 1980 Tr. 21; see App. B, *infra*, 19a & n. 11).

On October 30, 1979, the district court conducted a hearing to permit respondent to show cause why he should not comply with the enforcement order (see Oct. 30, 1979 Tr. 1-133). At the conclusion of the hearing—at which respondent appeared but offered no evidence—the court ordered production of the requested records (App. H, *infra*, 42a-43a). Respondent filed a notice of appeal from that order. On March 11, 1980, the court of appeals dismissed the appeal for lack of prosecution (see App. B, *infra*, 5a, 18a).

2. Following dismissal of the appeal, the district court again ordered respondent to produce the records and, in the event he failed to comply, to appear and show cause why he should not be held in contempt. (see App. E, *infra*, 34a-35a). Rather than comply, respondent filed a written "declaration" in which he denied possession or control of the documents and asserted a claim of privilege under the Fifth Amendment against providing any further information about the records.[3] At the contempt hearing, the revenue

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[3] See Nov. 10, 1980 Tr. 10-13. The declaration stated as follows (App. I, *infra*, 44a-45a):

> I have provided the Internal Revenue Service, in the person of Mr. Albert Rodriguez, such records of the St. George Company as are covered in the administrative summons and the ensueing [*sic*] Court Order as are in my possession.
>
> The St. George Company, a corporation under the laws of the state of Texas conducted business from August 1976 through June of 1977 only. There are, therefore, no corporate records for time periods prior to, or subsequent to those dates.
>
> I do not have in my possession or control any of the books, records, or papers of the St. George Company which are called for in the summons and court order in question; other than those which have already been sub-

agent who had issued the summons testified and was cross-examined by respondent. His testimony demonstrated that the summons had been served on respondent as president of St. George Company, and that he had failed to comply despite several court orders directing him to do so (Nov. 10, 1980 Tr. 29-33). Respondent was provided several opportunities to testify or to adduce other evidence at the hearing. He refused (Nov. 10, 1980 Tr. 9-13; Nov. 25, 1980 Tr. 15-16). At the conclusion of the hearing the district court found (1) that the records sought by the summons "exist or were in existence prior to June 12, 1979, the day the Internal Revenue Service summons was issued," and (2) that respondent "failed to submit acceptable proof of his claimed inability to comply" (App. E, *infra*, 35a, 37a). Accordingly, respondent was found to be in civil contempt and ordered to be confined until he purged himself of the contempt by producing the requested records (App. D, *infra*, 31a).

3. On February 10, 1981, a divided panel of the court of appeals vacated the order of contempt, and on April 17, 1981, issued opinions explaining the rationale for its decision. The majority concluded that respondent had been placed in "an untenable position" in which "[t]he only way he can [purge himself of contempt] would be for him to yield his constitutional privilege against self-incrimination"

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mitted to Mr. Rodriguez. Further, I must respectfully decline to answer any further questions concerning these documents, on the advise [*sic*] of counsel, on the grounds that the answers to such questions may tend to incriminate me and are thus privileged under the Fifth Amendment to the Constitution of the United States.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

(App. B, *infra*, 9a). Since, in the majority's view, Meeks "could not comply with the court order without sacrificing his properly asserted constitutional right," (App. B, *infra*, 10a), the contempt order was vacated. The only apparent basis for this conclusion is the majority's assumption that Meeks, in fact, could not comply by producing the records. The assumption was based on respondent's written "declaration"—which the district court excluded in light of Meeks' refusal to submit to cross-examination—and statements he made to IRS agents concerning a purported lack of possession or control of the documents.

Judge Reavley dissented, disagreeing with the majority's assumptions of fact and construction of the contempt order. He noted that the uncross-examined "declaration" was not evidence, and that there was no evidence in the record establishing that respondent was unable to comply (App. B, *infra*, 24a). The dissent also noted that the district court had not held respondent in contempt for refusing to testify, as the majority apparently assumed, but rather had grounded the contempt solely on Meeks' refusal to produce records. Moreover, unlike the majority, the dissent found this case indistinguishable from the Fifth Circuit decision in *United States* v. *Hankins*, 565 F.2d 1344, rehearing denied and opinion clarified, 581 F.2d 431 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979) (see App. B, *infra*, 27a-28a). The dissent concluded (*id.* at 25a):

> If the majority's decision is left to stand, it will enable any individual to defy a court order enforcing an IRS summons to produce documents, so long as he or she claims (by "declaration") a lack of possession or their present nonexistence and then asserts his or her privilege against self-incrimination.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the assertion of the Fifth Amendment privilege against self-incrimination in civil contempt proceedings. The court of appeals has incorrectly decided these questions in a manner that cannot be reconciled with established law governing IRS enforcement proceedings and the availability of contempt sanctions. Accordingly, unless it is reversed, the decision below, along with the similar decision of the Ninth Circuit in *United States* v. *Rylander*, 656 F.2d 1313 (1981),[4] will provide a roadmap for future evasion of lawful process. The adverse consequences of these decisions will not be limited to tax cases; they are virtual checklists for disobedience of any administrative or judicial order to produce unprivileged records. Moreover, the court of appeals' holding that mere assertion of the Fifth Amendment privilege is a sufficient defense in a contempt proceeding effectively removes from district courts the power to enforce compliance with their valid orders by imposing civil contempt sanctions.

The decision of the court of appeals will greatly hamper the IRS's ability to fulfill its statutory mandate of assessing proper tax liabilities. If investigations are foreclosed by a simple assertion of the Fifth

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[4] The Ninth Circuit decided *Rylander* on September 4, 1981, and Justice Rehnquist has extended until December 18, 1981, the time within which a petition for a writ of certiorari may be filed. The rationale of the Ninth Circuit differs slightly from that of the Fifth Circuit in *Meeks*. The variations in the facts and analysis in these cases make it appropriate for this Court to grant both petitions so that the two cases may be considered together and all the ramifications of the decisions below fully explored.

Amendment privilege in the absence of any evidence that the recipient of a summons is unable to comply, the government will be deprived of information essential to a proper review of tax returns.

This Court should grant review in this case to correct the manifestly erroneous decision of the court of appeals, which conflicts with prior decisions of this Court and other courts of appeals.

1. This Court has recognized that every citizen has a duty to provide all the evidence he can when called to do so by an appropriate authority. *United States* v. *Bryan*, 339 U.S. 323, 332 (1950). A subpoena or summons places an individual under a duty to make "in good faith all reasonable efforts to comply." *United States* v. *Ryan*, 402 U.S. 530, 534 (1971); *United States* v. *Bryan*, *supra*, 339 U.S. at 332. While an inability to comply, if established by competent evidence, is of course a complete defense to a summons, such a defense must be raised in a timely fashion. *McPhaul* v. *United States*, 364 U.S. 372, 380 (1960); *United States* v. *Bryan*, *supra*, 339 U.S. at 332; *United States* v. *Fleischman*, 339 U.S. 349, 352 (1950). By raising defenses on a timely basis a witness not only demonstrates a proper respect for the legal process, but also allows those defenses to be addressed at an appropriate time. *United States* v. *Bryan*, *supra*, 339 U.S. at 332-333. See *Fisher* v. *United States*, 425 U.S. 391, 395 (1976). If a summoned party does not, however, raise the question of his ability to comply during a summons enforcement proceeding, the court is entitled to presume he can comply and the court's enforcement order conclusively establishes that the witness can produce the records. *Maggio* v. *Zeitz*, 333 U.S. 56, 74 (1948).

Since enforcement orders are final and appealable, *Reisman* v. *Caplin*, 375 U.S. 440 (1964), and "will

bind the parties in future litigation," *United States* v. *First National State Bank of New Jersey*, 616 F.2d 668, 675 (3d Cir.), cert. denied, 447 U.S. 905 (1980), respondent should have been barred from raising, at the subsequent contempt hearing, the question whether he had possession and control of the corporate records at the time of the enforcement order. *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 75-76. See also *United States* v. *Peter*, 479 F.2d 147 (6th Cir. 1973); *United States* v. *Secor*, 476 F.2d 766 (2d Cir. 1973).[5]

2. The enforcement order creates the presumption that summoned records continue to exist and to remain in the witness' possession. That presumption will control subsequent proceedings unless rebutted. As this Court stated in *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 75-76, the presumption of continuing existence and possession

> can successfully * * * [be overcome] only with a showing of present inability to comply. [The witness] cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession. Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by evidence or by his own denials which the court finds incredible in context.

In accordance with this principle, the district court properly found that respondent's total absence of evidence failed to prove his inability to comply. This conclusion is consistent with prior decisions of this Court and of the courts of appeals which hold

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[5] At the enforcement hearing, the government satisfied all the conditions required by *United States* v. *Powell*, 379 U.S. 48 (1964), for enforcement of a summons.

that the witness bears the burden in a contempt proceeding of proving his inability to comply. See *McPhaul* v. *United States*, *supra*, 364 U.S. at 376, 379; *Nilva* v. *United States*, 352 U.S. 385, 392 (1957); *United States* v. *Bryan*, *supra*, 339 U.S. at 330-331; *United States* v. *Fleischman*, *supra*, 339 U.S. at 363; *Oriel* v. *Russell*, 278 U.S. 358, 366 (1929); *United States* v. *Hansen Niederhauser Co.*, 522 F.2d 1037, 1040 (10th Cir. 1975); *NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973); *United States* v. *Hankins*, *supra*, 565 F.2d at 1351-1352.

The decision below has carved out an exception to this rule when the Fifth Amendment privilege is asserted. Neither the Fifth Amendment, however, nor the decisions of this Court support the conclusion that a naked assertion of the privilege against self-incrimination can shift to the government the burden of proving a double negative, *i.e.*, that respondent is not unable to comply. The facts on this issue are of course uniquely within the respondent's knowledge. In *McPhaul* v. *United States*, *supra*, a case in which the Fifth Amendment privilege was the sole justification for refusing to provide information, this Court held that a witness had not carried his burden and had raised no issue regarding the existence of the subpoenaed records or his ability to produce them. Similarly, in *United States* v. *Johnson*, 247 F.2d 5 (2d Cir.), cert. denied, 355 U.S. 867 (1957), and *Lopiparo* v. *United States*, 216 F.2d 87 (8th Cir. 1954), cert. denied, 348 U.S. 916 (1955), the courts held that respondents could not meet their burden simply by denying possession and asserting the Fifth Amendment privilege. Cf. *United States* v. *Miller*, 638 F.2d 39 (8th Cir. 1980).

By allowing respondent to avoid contempt merely by asserting the privilege against self-incrimination,

the panel majority places respondent in a better position than if he had made a good faith effort to comply with the subpoena and a bona fide, but unsuccessful, effort to prove his inability to comply further. Accordingly, the decision below is in conflict with opinions of the Second and Eighth Circuits[6] and is directly contrary to this Court's observation in *United States* v. *Bryan*, *supra*, 339 U.S. at 332, that "if * * * a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena."

3. Aside from respondent's ambiguous and inconsistent statements to IRS agents concerning his inability to produce documents,[7] the only "evidence" on which the majority below relied was respondent's written "declaration." This document was properly excluded by the district court when respondent refused to testify or be subjected to cross-examination. Although the majority does not find the district court's ruling to be error, it nevertheless refers to the "declaration" as "evidence" of inability to comply. This conclusion is flatly wrong. Either the declaration was properly excluded—in which case respondent made no showing of inability to comply and failed to carry his burden of proof—or it should have been

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[6] See *United States* v. *Johnson*, *supra*; *Lopiparo* v. *United States*, *supra*.

[7] Respondent's few statements that he could not produce any further documents were equivocal and contradicted by his contemporaneous statements that records existed or could be reconstructed. See App. B, *infra*, 15a-17a. In any event, the issue is one properly entrusted to the finder of fact. *Nilva* v. *United States*, *supra*, 352 U.S. at 395. The district court's finding on this issue is supported by the record and was not found to be clearly erroneous by the court of appeals.

admitted into evidence—in which case respondent should have been found to have waived his Fifth Amendment privilege and compelled to submit to cross-examination on subjects raised in the "declaration." *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *Brown* v. *United States*, 356 U.S. 148, 154-156 (1958); see *Johnson* v. *United States*, 318 U.S. 189, 195-196 (1943); *United States* v. *Beechum*, 582 F.2d 898, 907-910 (5th Cir. 1978) (en banc); *Hankins* v. *Civiletti*, 614 F.2d 953, 954 (5th Cir. 1980). The majority allows respondent to have it both ways: his uncross-examined statement, coupled with his assertion of the privilege against self-incrimination, has been held to satisfy his burden of proof and to block further inquiry by the government. In effect, the government investigation has been stymied despite respondent's failure to meet the burden which the decisional law clearly places on him.

4. The majority erroneously assumes that the only course available to respondent is to forgo his Fifth Amendment privilege to purge his contempt (App. B, *infra*, 9a-10a). This is not the case, as the dissent notes (App. B, *infra*, 20a-21a).[8] Respondent had at least three alternatives: (1) to produce the documents which the district court found to exist, (2) to prove his inability to comply by adducing credible evidence, or (3) to take the stand and testify concerning the whereabouts of the documents and face cross-examination on that subject. The majority's conclusion is necessarily premised on the assumption that the first alternative—production of documents—is impossible. But in the present posture of the case, the opposite assumption must govern: that the docu-

[8] Even assuming respondent was compelled to make that choice, the court of appeals' holding that the Fifth Amendment was thereby violated conflicts with this Court's decision in *McGautha* v. *California*, *supra*, 402 U.S. at 213.

ments exist and can be produced, as the district court found. See *Maggio* v. *Zeitz*, *supra*. Moreover, the majority totally ignores the second alternative: that respondent may adduce independent evidence that the documents do not exist or are not in his possession or control (see App. B, *infra*, 20a & n.13).

Having summarily dispatched two of the alternatives available to respondent, the majority concludes that the contempt order compelled Meeks to forgo the Fifth Amendment privilege and punished him for his failure to testify. The majority has thus misinterpreted the district court's order. Meeks was not held in contempt for refusing to testify; rather, his contempt was his failure to comply with a valid order. This distinction is basic to the case. It is precisely this difference that distinguishes this case from *Curcio* v. *United States*, 354 U.S. 118 (1957), in which a grand jury witness was held in contempt for refusing to testify concerning the whereabouts of subpoenaed documents. This Court reversed Curcio's conviction for criminal contempt because he could not be punished for invoking his constitutional privilege. In so holding, however, the Court observed that the petitioner in *Curcio* "might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*." 354 U.S. at 127 n.7. Although precisely the situation envisioned in *Curcio* occurred here, the court of appeals has swept away the distinction noted in *Curcio* and has, accordingly, fashioned a result which is in conflict with prior decisions of this Court and other courts of appeals.

5. The practical effects of the decision below are substantial, and could materially impair the government's ability to secure information essential to a proper assessment of tax liability. Under the court of appeals' reasoning, a recipient of an IRS sum-

mons may toy with the government indefinitely, by withholding information—as respondent here has done for two and one-half years—in the hope that the investigation will be delayed until the statute of limitations has run.[9] The decision would thus allow respondent to withhold available defenses—*e.g.*, inability to comply—until after an enforcement order has been entered and affirmed on appeal, to raise such defenses belatedly in a contempt hearing, and to satisfy his burden of proof by submitting a self-serving "declaration" and asserting the privilege against self-incrimination. Such a result ill serves the interests of justice or of even-handed law enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consolidate this case with *United States* v. *Rylander* or to hear the cases in tandem.

Respectfully submitted.

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DECEMBER 1981

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[9] See 26 U.S.C. 6501(a), (c) and 6531.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 80-2370

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., PLAINTIFFS-APPELLEES

v.

GEORGE W. MEEKS, AS PRESIDENT OF
ST. GEORGE COMPANY, DEFENDANT-APPELLANT

Feb. 10, 1981

Appeal from the United States District Court for the Western District of Texas; Dorwin W. Suttle

Before CHARLES CLARK, REAVLEY, and WILLIAMS, Circuit Judges.

PER CURIAM:

The order adjudging appellant George W. Meeks in contempt of court for failure to produce records of the St. George Corporation or to explain why he cannot produce them, and ordering his confinement until he purges himself of contempt is VACATED.

Vacating this order does not bar proceedings undertaken to determine if appellant should be adjudged guilty of criminal contempt and confined for a fixed term for failure to obey the order of the court to produce the records. Any finding of contempt, however, cannot be grounded upon an assertion of the privilege against self-incrimination by Meeks

when asked to explain why he cannot now produce such records.

Full opinion will be submitted later. Judge Reavley dissents.

ORDER VACATED.

Opinion issued, 5th Cir., 642 F.2d 733.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 80-2370

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., PLAINTIFFS-APPELLEES

v.

GEORGE W. MEEKS, AS PRESIDENT OF
ST. GEORGE COMPANY, DEFENDANT-APPELLANT

April 17, 1981

Appeal from the United States District Court
for the Western District of Texas

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

On February 10, 1981, slip op. 5993, —— F.2d ——, this Court vacated an order of the United States District Court for the Western District of Texas adjudging appellant George W. Meeks in contempt of court for failure to produce records of the St. George Corporation or to explain why he could not produce them, and ordering his confinement until he purged himself of contempt. The brief opinion by the Court issued on that date indicated that an explanation of the decision of the Court would follow, and this opinion is that explanation.

Appellant George W. Meeks was the president and one of two stockholders of the St. George Corporation which was under investigation by the Internal Revenue Service in the spring of 1979. On June 12, 1979, the Court ordered Meeks to produce records of the corporation. In response to this order Meeks appeared in person before an IRS agent on June 22, 1979. At that time he indicated he had access to a great many corporate records, that there were boxes and boxes of records, and he made inquiry concerning and requested transactional immunity. Immunity was not granted.

On August 21, 1979, the district court ordered him to appear before the IRS on September 13 and produce the records. It further ordered that if he failed to appear he was directed to appear in the district court to show cause why he had failed to comply. Meeks did appear before IRS agent Albert Rodriguez, Jr. on September 13, 1979. He produced some twenty documents which were of little or no use in the tax investigation. He then told the agent that he did not have and could not locate other corporate records. He indicated that possibly some records might be reconstructed and that a substantial amount of the records might have been destroyed because of difficulty with the computer in which they had been entered.

At the show cause hearing later in the month of September 1979, Meeks made various motions, and the show cause portion of the hearing was finally set for October 30, 1979. On that date the district court denied all of Meeks' motions and issued an order requiring him to produce the documents on November 16, 1979. Three days before that scheduled court appearance he filed a notice of appeal from the

October 30 order and a motion for stay. The stay was granted.

On March 11, 1980, the Court of Appeals dismissed Meeks' appeal for want of prosecution and for failure to file his brief. Over five months later, on August 22, 1980, the IRS filed a motion for an order to enforce the summons for the documents. The district court ordered Meeks to produce the records on October 6, 1980. He appeared on October 6 but refused to answer any specific questions about the whereabouts of its records on the ground that the answers might tend to incriminate him.

At a show cause hearing on November 25, 1980, Meeks refused to testify but submitted a declaration to which he was willing to swear that he had provided the IRS with all of the records which he had in his possession which were covered by the order. He refused to answer any further questions concerning the documents on the ground the answers might tend to incriminate him. The court refused to accept the declaration. It found that the records did then exist or, in the alternative, had been in existence prior to the June 12, 1979, summons. It further found that Meeks had failed to submit acceptable proof of his claimed inability to comply, and adjudged him in civil contempt. His confinement was ordered until he purged himself of the contempt by complying with the summons either by producing the records or testifying to explain why he could not produce them. This is the order which was appealed.

There is some evidence in the record which can justify a finding of fact that the records were in existence at the time of the original summons. As to evidence that they did not exist at the time Meeks was sentenced to civil contempt, he has said over and over again that they do not exist and in his submit-

ted statement which was to be sworn this was indicated. In addition, in his talk with agent Rodriguez on September 13, 1979, he stated that the documents were not in existence or at least were not in his possession and that he could not locate them.

It is the position of the IRS that the only way Meeks could purge himself of contempt was to produce the records or to explain why he could not produce them. Further, it is asserted the burden was on Meeks to prove that he could not produce the records. To the contention by Meeks that explaining what had happened to the records would require him to sacrifice his claim of privilege against self-incrimination, the IRS is unmoved. The Service asserts that Meeks' proof that he cannot comply with the summons is inadequate.

In *United States* v. *Hankins*, 565 F.2d 1344 (5th Cir. 1978); 581 F.2d 431 (5th Cir. 1978), this Court upheld a civil contempt order with an indefinite period of confinement in a case with similar facts. In that case, Hankins was ordered to turn over partnership records. He claimed the privilege against self-incrimination as against the obligation to produce the documents. This claim obviously was not effective because these were business documents and not personal documents. It is elementary that the claim of the privilege is a personal one and does not extend to the activities of a business entity, including a partnership, of which the person subpoenaed is or was a part. *Bellis* v. *United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974).

At a contempt hearing Hankins offered to testify as long as he was not cross-examined and this offer was refused. It is important, however, to note that he made no claim of the privilege against self-incrimination as it related to testimony as to what

happened to the missing ledger pages which were involved in the order. *United States* v. *Hankins*, *supra* at 565 F.2d 1344.

In the *Hankins* case a motion for rehearing en banc was then denied by the Court, but the Court wrote a clarifying opinion. The Court confirmed that the records involved were business records and that Hankins could not claim the privilege with respect to them. This was the basic thrust of the revised opinion. *United States* v. *Hankins*, 581 F.2d 431 (5th Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979). In a footnote the Court opinion made clear that it saw Hankins' attempt to jusify his refusal to respond to the summons actually was an attempt to relitigate the district court's earlier specific finding based upon lawful evidence that Hankins did have the records when the Court ordered the summons enforced.

There are three significant distinctions between the *Hankins* case and the case before the Court. In *Hankins*, the claim of the privilege against self-incrimination was made against the production of documents on the erroneous ground that a person could claim the privilege against the production of the papers of a business entity. There is no indication in the case that Hankins made a specific claim of the privilege against self-incrimination as against a governmental inquiry of what he personally might have done with the documents to make them no longer available. In contrast, in the *Meeks* case the only claim of privilege was the claim made when Meeks was asked to explain what happened to the documents. Meeks never claimed the privilege against the obligation to supply business documents but only against an inquiry as to his personal role with respect to unavailability of the documents.

Further, in *Meeks* it is claimed that as in *Hankins* there is no proof to show that Meeks could not at the time of the show cause hearing produce the documents because his submitted statement to this effect was not accepted. But we also have the testimony of IRS agent Rodriguez that Meeks told him in the official meeting on September 13, 1979, that Meeks could not produce the documents.

Third, contrary to *Hankins*, there was no specific finding by the court before the claim of privilege that at the time of the show cause order he could produce the documents.

Strong support for the position of Meeks in this appeal is found in *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957). In that case the Supreme Court reversed a criminal contempt conviction of an individual for invoking the privilege against self-incrimination in refusing to testify as to the whereabouts of corporate records which he had been ordered to produce. The Court in *Hankins* distinguished *Curcio* on the ground that *Curcio* did not involve a refusal to testify at a contempt proceeding. Further, *Hankins* can be distinguished because Hankins never made clear that his claim of privilege was directed solely against explaining what role he might have played in the fact that records were no longer available rather than a general claim that the records within themselves might incriminate him.

Meeks had a sound reason to decline to offer more than sworn testimony that he did not then have the records and to claim the privilege rather than be forced to explain what might have happened to the records. His was a valid fear that he would be waiving his privilege if he testified that he did not have the records. His concern was confirmed in the third

Hankins case in this Court, *Hankins* v. *Civiletti*, 614 F.2d 953 (5th Cir. 1980). In a habeas corpus proceeding, Hankins had submitted affidavits in the district court asserting his inability to comply with the production order. The Court rejected these affidavits. He then took the stand at the habeas corpus hearing and testified he had complied to the full extent of his current and future abilities. Upon cross-examination he then refused on the grounds of the claim of privilege against self-incrimination to explain what he knew about the missing papers.

In its per curiam opinion this Court concluded, "Clearly, Hankins has waived his fifth amendment privilege with regard to matters relevant to his direct testimony." *Hankins* v. *Civiletti*, *supra* at p. 955. This holding stands firmly for the proposition that if Meeks had testified that he could not produce the records, he would have waived the claim of privilege as to any possible role he might have played in making it impossible to produce them.

The position of the government in this case pushes Meeks into an untenable position. If he does not explain what happened to the records, he must remain in prison. The only key to his release is his explanation. This is the thrust of the civil contempt order. The only way he can be released from prison would be for him to yield his constitutional privilege against self-incrimination.

Stated in terms of the common explanation of civil contempt, the person who is in custody must have the "key to the jail" in his pocket. He must be free to release himself from confinement by complying with the order of the Court. But the only way that Meeks can comply with the order of the Court in this case is to sacrifice a personal constitutional

right. The civil contempt order forces Meeks to remain in jail until he testifies against himself as to matters which might tend to incriminate. This is in direct and specific contravention of the fifth amendment privilege. As the Supreme Court said in *Ullmann* v. *United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956): "[T]he sole concern (of the privilege) is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts." *Id.* at 438, 76 S.Ct. at 506. *See also* the reversal of the civil contempt order for refusing to give testimony in *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Since Meeks could not comply with the court order without sacrificing his properly asserted constitutional right, this Court directed that the civil contempt order be vacated. As we pointed out in our brief opinion on February 10, 1981, the vacating of this order does not bar proceedings undertaken to determine if appellant should be adjudged guilty of criminal contempt and confined for a fixed term for failure to obey the order of the court to produce the records. But a conviction of criminal contempt could not be grounded upon an assertion of the privilege against self-incrimination by Meeks when asked to explain why he cannot now produce such records. *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1967).

This opinion is filed in support of the decision of this Court of February 10, 1981, vacating the order of confinement of George W. Meeks for civil contempt. Judge Reavley dissented from that decision and dissents from this opinion.

REAVLEY, Circuit Judge, dissenting:

George Meeks, as president of the St. George Company,[1] was served an IRS summons on June 12, 1979, directing him to appear before an IRS agent and give testimony relating to the tax liability of that corporation and to produce its books and records.[2] In response to the summons, Meeks appeared in person before two revenue agents on June 22, 1979. He brought with him a number of his corporate records, but would not allow the two agents to examine them unless he, individually, was granted transactional immunity from prosecution.

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[1] The St. George Company, Inc., which was engaged in the auto parts business in San Antonio, Texas, received a certificate of involuntary dissolution from the Texas Secretary of State in March of 1979. That same month, Meeks as president of the St. George Company was notified by letter that the IRS intended to audit the corporate tax return of the St. George Company.

[2] The summons specifically sought the following books, records, papers and other data of the St. George Company for the fiscal years ending on June 30, 1977 and June 30, 1978:

(1) Corporate minute book;

(2) Any and all books and records and statements concerning corporation assets and liabilities;

(3) Any and all books and records and invoices concerning corporation income and expenses;

(4) All bank statements, cancelled checks and deposit slips from July 1, 1976 through August 31, 1978;

(5) All savings account statements and passbooks from July 1, 1976 through August 31, 1978; and

(6) Any and all payroll records of salaries or wages paid to officers or employees including cancelled checks and bank statements.

During the course of the meeting, Meeks commented to the agents that he interpreted the summons to mean that the IRS wanted to see all of the corporate records that existed for the time specified. The agents agreed with this assessment. Thereafter, Meeks indicated that he attempted to bring with him the books and records of the corporation identified in the summons, that he had access to a great many corporate records, that there were "boxes and boxes" of records, and that some of the corporate records requested existed in a computer.[3] The corporate min-

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[3] The June 27, 1979 meeting was tape recorded and later transcribed. The transcription of this meeting was introduced as an exhibit in the show cause hearing on the IRS' petition to enforce the summons. The exhibit reflects that Meeks, in the June 27 meeting, stated:

> ROBINSON: Do you have the books and records of the corporation with you?
>
> MEEKS: I have endeavored to bring with me to the best of my ability the books and records of the corporation that you so identified, however, I think you would admit and recognize that it would be next to impossible to bring every piece of paper that applies to that corporation, to gather it all together in one place and haul it anywhere, it would constitute boxes and boxes of pieces of paper and the physical problem in so doing is rather large. There is also the fact that some of those corporate records exist in a computer and I can't very well pick the computer up and bring it down here to your office either. Or some of them may exist in the computer.
>
> ROBINSON: Mr. MEEKS have you brought any of your records with you?
>
> MEEKS: I have brought a number of my records with me, yes.
>
> ROBINSON: Would you care to allow us to examine them at this time.
>
> MEEKS: I don't believe I can give you just free access to those records under the circumstances, ah you

ute book was the only record requested in the summons that Meeks indicated he did not have in his possession. However, Meeks' answer clearly implied that a corporate minute book did exist.[4] Moreover, Meeks' response that he did not have the minute book in his "possession" is ambiguous since it is not clear whether he did not have it and did not know where it was or who possessed it, or whether he did not have it and could not legally acquire it.[5] Because the

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have previously told me that you will not assist me in protecting my rights.

ROBINSON: I haven't said I would assist you individually in any way.

MEEKS: I know, you said that you will not—

ROBINSON: You're not involved as an individual here at this point.

[4] The transcription of the June twenty-seventh meeting shows the following verbal exchange with respect to the corporate minute book:

ROBINSON: Well Mr. MEEKS, are you prepared to allow us to examine the Corporation minute book at this time?

MEEKS: Ah, I would be more than happy to do so but I do not have the corporate minute book.

ROBINSON: Do you say you don't have it with you or you don't have one?

MEEKS: I do not have it with me because it is not in my possession.

[5] The record reflects that Meeks was both president and treasurer of the St. George Company and that a Ricky Dermody held the positions of vice-president and secretary. Tex. Bus. Corp. Act Ann. art. 2.44 requires each corporation to "keep correct and complete books and records of account and [to] keep minutes of the proceedings of its shareholders and board of directors . . . ." Therefore, it is entirely consistent with Meeks' statement—that the corporate minute book was not in his possession—that the minute book was in Dermody's possession as secretary of the corporation.

agents would not grant him transactional immunity,[6] Meeks, relying on the fourth and fifth amendments, refused to permit them to inspect the records he brought to the meeting.

Thereafter, the IRS sought enforcement of the summons. On August 21, 1979, the district court ordered Meeks to appear before the IRS and give testimony regarding the corporation's tax liability and produce the requested records. On September 13, 1979, Meeks appeared before an IRS agent and produced a few documents, some of which were already in the possession of the IRS.[7] Regarding the other records and data specified in the summons, Meeks stated that the majority of the records requested were not in his possession. When questioned as to who had possession of the elusive records so a summons could be issued for them, Meeks again replied that he did not have them, nor could he locate them, and then he claimed his fifth amendment privilege against self-incrimination. When questioned about the corporation's bank records (statements, cancelled checks, and deposit slips), Meeks claimed he did not have any and could not remember at which bank in San Antonio the corporation kept its account during the fiscal years in question.[8]

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[6] The revenue agents informed Meeks they had no authority to grant his request for transactional immunity.

[7] At the September 13 meeting, Meeks produced sixteen statements from two different auto parts suppliers. Meeks also produced three 941 forms (employer's quarterly tax returns) covering the fourth quarter of 1976 and the first and second quarters of 1977.

[8] Meeks' memory had substantially improved by November 10, 1980, when a hearing was held to show cause for him not being held in contempt. Although not under oath, but while

Later during that September 13 interview, Meeks indicated that some of the records sought by the IRS were entered into a computer and stored on diskettes. According to Meeks, considerable amounts of data were lost from this computer operation and that data was not available to him.[9] Nonetheless, Meeks unequivocally indicated that it might be possible to obtain some or all of the data sought if he could prevent the IRS from conducting a "fishing expedition" by having the agents tell him specifically what information they wanted.[10] The reasonable inference

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representing himself *pro se*, Meeks informed the district judge that the St. George Company had done its banking at the Kelly Field National Bank in San Antonio.

[9] After problems with this computer system, Meeks' company switched to another computer system which uses a hard disk pack to store data. It is not clear from a reading of the record whether the new computer system was instituted before the St. George Company received the certificate of involuntary dissolution. Also, even if the new computer system was installed after the St. George Company ceased to exist, it is not inconceivable that data relevant to the corporation would be stored in the new system since Meeks continued to operate the auto parts business as a sole proprietorship after the involuntary dissolution of the corporation. During the September thirteenth meeting, Meeks only indicated that data from the old computer system was not available to him because the data storing diskettes (floppy disks) of the old computer were not interchangeable with the hard disk pack of the new computer. The inference from Meeks' statements is that the old diskettes still existed. Thus if these diskettes were produced by Meeks, the IRS could have retrieved the sought-after data by locating a comparable computer system.

[10] The transcript of the meeting on September 13, 1979 reads, in pertinent part, as follows:

> MR. MEEKS: At approximately the same time that we initiated the corporation, we endeavored to go on a

from this statement is that Meeks did possess, or had access to, some documents and records from which he

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computer operation. I had never dealt with computers before in my life. Some of the records that you seek were entered into the computer, and the hard copies destroyed. I assume destroyed. The hard copies can no longer be found. We spent a year fighting with the computer. We subsequently had to get a different computer because of problems with it.

MR. RODRIGUEZ: What information—

MR. MEEKS: And much of the data that you want just doesn't—I—I cannot produce.

MR. RODRIGUEZ: What information was entered into the computer, and what type of system is it? Is it tapes, or cards, or—

MR. MEEKS: Well, is [sic] and was—the operation that we have now is on a disc [sic] pack. That is not the computer that we had then. That's not the computer that we had the problems with, that we were losing considerable amounts of data from, that we were having considerable programming problem with.

MR. AREVALO: Is that your computer, or do you all buy time, or—

MR. MEEKS: It is an in-house unit, but it is leased.

MR. AREVALO: Okay.

MR. RODRIGUEZ: And you are saying, then, that the—the data from that computer is not available to you?

MR. MEEKS: No, it is not. The records in that computer were kept on what are generally referred to as floppy discs [sic], or discettes [sic]. The computer operation that we have now, runs on a hard disc [sic] pack, and does have a little tape cassette thing. The old computer had neither the tape cassette, nor the hard disc [sic].

MR. RODRIGUEZ: Uh-huh.

MR. MEEKS: And—

MR. AREVALO: What happened with the print-outs?

could obtain or reconstruct the items and information sought by the IRS.

MR. MEEKS: What few print-outs there are, or were, have nothing to do with the records that you—that you wish to see.

MR. RODRIGUEZ: Well, we asked for all records concerning the corporation's assets, liabilities, incomes, and expenses. That pretty well covers—

MR. MEEKS: Well, I don't think a price list would have to do with an asset, or liability. It's just a list of prices of merchandise, whether the merchandise is there or not. This is the kind of thing that—

MR. RODRIGUEZ: What about inventory?

MR. MEEKS: Inventories were—for some considerable period, were done partially by hand, partially by the computer. It was my intention, when we got the computer, to have it take care of all of that. It didn't work; didn't work at all.

MR. RODRIGUEZ: So then—

MR. MEEKS: I—

MR. RODRIGUEZ: —what information—

MR. MEEKS: I spent—well, never mind. You don't need—you're not interested in that.

MR. RODRIGUEZ: What information is on the computer, though? Income and expenses?

MR. MEEKS: I've avoided bringing something else up here that perhaps I really should. What you're asking me for here is for every piece of data that concerns the company for the time period involved, every invoice, every statement, every—

MR. RODRIGUEZ: That's covered by the summons.

MR. MEEKS: Every piece of paper that exists. And you're now also asking me for every piece of data that might have existed in the computer.

MR. RODRIGUEZ: I'm asking you for the books and records of the corporation.

MR. MEEKS: This—

[Footnote continued on page 18a]

On September 17, 1979, Meeks filed a motion to be excused from complying with the district court's enforcement order, alleging that he had fully complied with the order and had "produced all documents and records in his possession or control *which are necessary to enable a representative of the IRS to complete his federal tax returns. . . .*" (Emphasis added.) A hearing was held on October 30, 1979, for Meeks to show cause why he should not be compelled to produce the requested records and documents. After hearing the evidence, the district court entered an order requiring Meeks to produce the requested records and documents.

On November 13, 1979, Meeks filed a notice of appeal from the district court's enforcement order of October 30, 1979. This court dismissed the appeal for want of prosecution on March 11, 1980, because of Meeks' failure to file a brief. The district court

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[10] [Continued]

MR. RODRIGUEZ: And if they are on a computer, and I'd like to see the print-out, then.

MR. MEEKS: Well, the print-outs don't exist. This makes very much of a fishing expedition. If you would tell me, sir, specifically what information you want—

MR. RODRIGUEZ: I want the general—

MR. MEEKS: —it is possible that some or all of that data might be obtainable.

MR. RODRIGUEZ: Uh-huh.

MR. MEEKS: Or maybe even could be reconstructed. I don't know, because I don't know what you want.

MR. RODRIGUEZ: I want the—

MR. MEEKS: You asked for—

MR. RODRIGUEZ: It's outlined in the summons. I want the books of—of the corporation concerning the assets and liabilities. I want the books concerning income. I want the books concerning expenses.

subsequently entered an order on August 28, 1980, requiring Meeks to produce the requested documents and records on October 6, 1980. On that date, Meeks appeared before an IRS agent, but did not produce the records specified in the summons. At that meeting, Meeks did agree to provide certain waivers which would allow the IRS to secure certain bank records. However, when the waivers were mailed back to the IRS by Meeks, the beginning and ending dates were altered so as to make the waivers unacceptable to the IRS.[11]

On November 25, 1980, a hearing was held for Meeks to show cause why he should not be held in contempt for failure to obey the court's enforcement order. Meeks refused to testify in his own behalf to explain the whereabouts of the requested records and documents or answer any questions under oath concerning them on the ground that such testimony might tend to incriminate him. However, Meeks did submit a written declaration to the effect that he did not "have in [his] possession or control any of the books, records, or papers of the St. George Company which are called for in the summons and court order . . . ."[12] Meeks appeals the district court's order adjuding him in civil contempt.

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[11] The record shows that Meeks changed the beginning date on the waivers from July 1, 1976 to August 1, 1976, and that he changed the ending date on the waivers from August 31, 1978 to June 30, 1977. In its summons the IRS sought bank records of the St. George Company for the fiscal years ending June 30, 1977 and June 30, 1978. The IRS required an ending date on the waivers two months past the end of the fiscal year in order to pick up any items from the 1977-78 fiscal year that had not cleared by June 30, 1978.

[12] This statement is blatantly false at least because of the fact that Meeks is in *control* of bank records of the St. George

The majority opinion rightly states that a person held in civil contempt must carry "the 'key to the jail' in his pocket," that is, he must be able to release himself from confinement by complying with the court's order. *See Maggio* v. *Zeitz*, 333 U.S. 56, 68, 68 S.Ct. 401, 407, 92 L.Ed. 476 (1948). I dissent from the court's decision in this case because the majority erroneously concludes "the only way that Meeks can comply with the order of the Court in this case is to sacrifice a personal constitutional right [*i.e.* his right to be free from compelled self-incrimination]." —— F.2d at —— [slip op. at 5997].

Meeks is being held in contempt by the district court for his failure to produce documents and records, not for refusing to testify. He can comply with the court's order either by producing the requested documents and records or by establishing his present inability to comply.[13] Hence, the majority fails to consider that Meeks can comply with the court's order by producing the documents and records. This bespeaks the infirm foundation of the majority opinion, which is the assumption, unsupported by a review of the entire evidence, that Meeks no longer pos-

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Company for the fiscal year ending June 30, 1978, and has not given a waiver for the bank, at which the corporation had an account, to release its records to the IRS relative to the corporation for the 1977-78 fiscal year.

[13] It may well be possible for Meeks to establish his present inability to comply, if indeed that is the case, by evidence other than his own testimony. This possibility goes ignored by the majority and apparently unexplored by Meeks in the proceedings below. If Meeks is indeed unable to comply, and had he been represented by counsel below, such counsel may well have been able to establish Meeks' inability to comply without his testimony.

sessed, or had control over, the documents and records sought.[14] The majority never really addresses the pivotal issue of this case, which is whether the district court was "clearly erroneous" in finding that the documents and records sought exist or were in existence when the summons was issued. The majority does not expressly conclude that the district court's finding regarding Meeks' ability to comply with the order is clearly erroneous. Instead, the majority notes that there is "some evidence in the record" to justify a finding that the documents and records existed when the summons was issued. Then my brethren comment that as to the evidence that the documents and records did *not* exist when Meeks was sentenced to civil contempt, he has said over and over again that they do not exist, and his declaration, to which he would have sworn, indicated this. Finally, as additional "evidence" that the documents and records did not exist, the majority observes that in his talk with the revenue agent on September 13, 1979, Meeks stated "the documents were not in existence or at least were not in his possession and that

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[14] The majority's assumption that Meeks cannot comply with the district court's order also ignores the record. In the September 13, 1979 meeting, Meeks claimed he could not remember at which bank the St. George Company had an account. Well over a year later, Meeks did remember the name of the bank and supplied the IRS with a waiver to permit the bank to release copies of the corporation's statements, cancelled checks and deposit slips dating from August 1, 1976 to June 30, 1977 to the IRS. Therefore, even assuming *arguendo* that the majority's assumption is otherwise correct, Meeks obviously could partially comply with the summons and order by furnishing the IRS with the bank records for the fiscal year ending on June 30, 1978. *See* footnotes 11 & 12, *supra*.

he could not locate them." —— F.2d at —— [slip op. at 5995].

On reviewing the entire evidence, I am not left with a "definite and firm conviction that a mistake has been committed," *B. H. Bunn Co.* v. *AAA Replacement Parts Co.*, 451 F.2d 1254, 1260 (5th Cir. 1971), and I, therefore, cannot conclude that the district court's finding regarding the existence of the documents and records is clearly erroneous. *See* Fed. R.Civ.P. 52(a).

Prior to the district court's enforcement order of October 30, 1979, compelling Meeks to produce the documents and records outlined in the summons, Meeks had filed a motion to be excused from complying with the summons and previous court order requiring production of the documents and records on the ground that he had already complied with the order by producing all such documents and records in his possession. When the district court entered its enforcement order on October 30, it expressly overruled Meeks' motion to be excused from compliance. Hence, the order of October 30, 1979 contains an implicit finding of fact concerning Meeks' ability to comply with the court's order, *i. e.* that the records sought in the summons existed and that Meeks had access to or was in posesssion of them.[15]

This order, entered on October 30, 1979, along with its implicit finding that Meeks had the ability to comply, became final and unreviewable when this court dismissed the appeal of that order for want of prosecution. Therefore, when Meeks appeared on

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[15] *See, e.g., Clinkenbeard* v. *Central Southwest Oil Corp.*, 526 F.2d 649, 650-51 (5th Cir. 1976) (appellate court implied finding of fact on part of district court that must necessarily have been made by the lower court to support its judgment).

November 25, 1980, at the hearing to show cause why he should not be held in contempt for non-compliance with the renewal of the court's order compelling production of the documents and records, he was confronted by a prima facie case that such documents and records continued to exist and remained in his possession or control. *See Maggio* v. *Zeitz*, 333 U.S. 56, 75, 68 S.Ct. 401, 411, 92 L.Ed. 476 (1948). This is so because Meeks cannot now, on appeal from a civil contempt adjudication, attack the original production order since it is res judicata on the issue of his possession of the documents and records at the time it was issued. *Id.; United States* v. *Hankins*, 581 F.2d 431, 437 n.8 (5th Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979).

Once an order establishes prior possession, the reasonable inference with respect to books and records is the continuance thereof. *Maggio*, 333 U.S. at 65-66, 75, 68 S.Ct. at 406, 411. Thus although Meeks could not challenge, at the civil contempt show cause hearing, the previous adjudication of possession, he was not prevented from establishing his lack of present possession of the items enumerated in the court's order. As noted by the Supreme Court in *Maggio*, if the potential contemnor offers no evidence as to his inability to comply with the court's order, or stands mute,[16] he does not meet the issue of estab-

[16] The concealment of assets in any bankruptcy proceeding or the destruction of records or documents pertaining to the bankrupt is a crime punishable by up to five years imprisonment and/or a fine up to $5,000. 18 U.S.C. § 152. In *Maggio*, the Supreme Court of the United States did not seem to be concerned that a bankrupt in a civil contempt proceeding, confronted by a turnover order establishing prior possession, might stand mute, relying on his fifth amendment privilege of self-incrimination, and yet be held in contempt for his failure to establish lack of present ability to comply.

lishing his lack of present possession to overcome the prima facie case. 333 U.S. at 75, 68 S.Ct. at 411. "Nor does he do so by evidence or by his own denials which the court finds incredible in context." *Id.* at 75-76, 68 S.Ct. at 411.

At the hearing to show cause why he should not be held in contempt, Meeks failed to introduce any evidence that the records no longer existed or that he did not presently possess or have access to them. Meeks' uncross-examined declaration is not "evidence." Even considering the record of the October 30, 1979 final order compelling production of the items sought, there is a lack of proof to show Meeks' inability to comply. The majority bases its unarticulated holding that the district court was clearly erroneous in its finding as to the existence of the records [17] on the allegations in Meeks' unsworn motion to excuse himself from compliance and on Meeks' self-serving statements to the revenue agent in the

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[17] Implicit in the district court's finding that the documents and records exist, or were in existence at the time when the summons was issued, is the finding that Meeks had possession or control of them. *See, e.g., Clinkenbeard* v. *Central Southwest Oil Corp.*, 526 F.2d at 650-51 (implying a finding of fact on the part of the district court that must necessarily have been made by the court to support its judgment); *Gilbert* v. *Sterrett*, 509 F.2d 1389, 1393 (5th Cir.), *cert. denied*, 423 U.S. 951, 96 S.Ct. 373, 46 L.Ed.2d 288 (1975) (the district court's findings of fact "should be construed liberally and found to be in consonance with the judgment, so long as that judgment is supported by evidence in the record"); *Rayonier, Inc.* v. *Polson*, 400 F.2d 909, 923 (9th Cir. 1968) (it is not necessary for a district court to make findings asserting the negative of each issue of fact raised; it is sufficient if the affirmative facts found by the court, construed as a whole, negative each requested contention).

September 13, 1979 meeting that he did not have the requested documents and records. The only real "evidence" consists of Meeks' statements to the revenue agent.[18] In making its credibility choice, the district court was entitled to discount these self-serving statements, especially in view of Meeks' contradictory statements during the same meeting that it might be possible for him to obtain some or all of the data sought by the IRS if he could prevent the agents from conducting a "fishing expedition."

If the majority's decision is left to stand, it will enable any individual to defy a court order enforcing an IRS summons to produce documents, so long as he or she claims (by "declaration") a lack of possession or their present nonexistence and then asserts his or her privilege against self-incrimination. The district court is then left only a criminal contempt sanction with which it can enforce its order.[19] Moreover, the majority's decision will permit any party to a civil action to defy a court's order under Fed. R.Civ.P. 37(a)(2) to produce documents for inspection by claiming inability to comply and asserting the fifth amendment privilege against self-incrimina-

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[18] These statements by Meeks that he did not have the requested books and records, which are contained in the transcript of the September 13, 1979 meeting and which were offered by the Government as admissions of a party opponent, Fed.R.Evid. 801(d)(2), to the extent they give aid to the majority's conclusion, could have been rejected with the credibility of Meeks by the trial court, within whose province the making of credibility choices lies.

[19] The penalty for a criminal contempt is six months in jail and/or a fine of $1,000. 18 U.S.C. § 402.

tion,[20] without fear of the sanction of being held in civil contempt. *See* Fed.R.Civ.P. 37(b)(2)(D).

The majority finds strong support in *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957), for the position taken by Meeks in this appeal. I find no support for Meeks' position in the *Curcio* decision because it is inapposite to this case. *Curcio* involved a criminal contempt conviction of a contemnor who was subpoenaed to appear before a grand jury and to give testimony and produce documents. The contemnor appeared but failed to produce the demanded books and records. He did testify that the demanded books and records were not in his possession, but "refused on the ground of self-incrimination, to answer any questions pertaining to the whereabouts, or who had possession, of the books and records he had been ordered to produce." 354 U.S. at 119, 77 S.Ct. at 1147. It was this refusal to testfy concerning the whereabouts of the documents for which contemnor was adjudged guilty of criminal contempt by the district court.

The Supreme Court in *Curcio* held that the contemnor, who as the custodian of a labor organization's books and records, could not be punished for invoking his fifth amendment privilege against self-incrimination. The court reasoned that, although the contemnor was not entitled to the privilege with respect to production of the records themselves, he was entitled to the privilege when questioned regarding their whereabouts. This is so because contemnor

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[20] A party who either destroyed or secreted documents subject to a production order under Fed.R.Civ.P. 37(a)(2) would be guilty of obstructing justice, which is punishable by up to five years imprisonment or a fine of not more than $5,000, or both. 18 U.S.C. § 1503.

"might be compelled to convict himself out of his own mouth."[21] 354 U.S. at 128, 77 S.Ct. at 1151-1152.

In this case, Meeks was not adjudged to be in contempt for a failure to answer questions concerning the whereabouts of the records sought by the summons. Instead, he was held in contempt for his failure to produce those records. The Supreme Court impliedly approved such a measure in *Curcio*, when it noted that the petitioner therein "might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*." 354 U.S. at 127 n.7, 77 S.Ct. at 1151 n.7. *Wilson* v. *United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 571 (1911), which involved the commitment of a custodian of corporate records for civil contempt until he purged himself by producing the subpoenaed records, was cited by the Court in *Curcio* for its conclusion that the contemnor could have been proceeded against for failing to produce the records, although not for his refusal to testify concerning their whereabouts.

I conclude that this case is controlled by the decision of this circuit in *United States* v. *Hankins*, 565 F.2d 1344, 1351-52 (5th Cir.), *aff'd on rehearing with additional reasons stated*, 581 F.2d 431, 437 (5th Cir. 1978). "With the fact of noncompliance with the court's previous order clearly and convinc-

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[21] When it stated that the petitioner in *Curcio* "might be compelled to convict himself out of his own mouth," the Supreme Court meant that if he was compelled to testify regarding the whereabouts of the union's records, he might convict himself of obstructing justice and racketeering. 354 U.S. at 121 n.2, 77 S.Ct. at 1148 n.2. *See also* 18 U.S.C. §§ 1503 and 1951.

ingly established, [Meeks'] failure to testify, . . . resting on his Fifth Amendment right not to testify, means that he has failed to show cause why he should not be held in contempt of an outstanding order." 581 F.2d at 437. However, I do recognize that Meeks' commitment for civil contempt would not be indefinite if, as he alleges, he is now truly unable to comply with the court's order to produce the documents and records. As the Supreme Court remarked in *Maggio*:

> "[T]he [contemnor] may be permitted to deny his present possession and to give any evidence of present conditions or intervening events which corroborate him. The credibility of his denial is to be weighed in the light of his present circumstances. *It is everywhere admitted that even if he is committed, he will not be held in jail forever if he does not comply. His denial of possession is given credit after demonstration that a period in prison does not produce the* [*documents*]. The fact that he has been under the shadow of prison gates may be enough, coupled with his denial and the type of evidence above, to convince a court that his is not a willful disobedience which will yield to coercion."

333 U.S. at 76, 68 S.Ct. at 411 (emphasis added).

I would affirm the order of the district court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-2370

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., PLAINTIFFS-APPELLEES

versus

GEORGE W. MEEKS, AS PRESIDENT OF
ST. GEORGE COMPANY, DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion April 17, 1981,
5 Cir., 198—, —— F.2d ——).
(July 10, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerre S. Williams
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-79-CA-287

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., INTERNAL REVENUE AGENT

vs.

GEORGE W. MEEKS, AS PRESIDENT
OF ST. GEORGE COMPANY

Filed Nov. 25, 1980

ORDER HOLDING RESPONDENT IN CONTEMPT

It is hereby ordered, adjudged, and decreed that the respondent, George W. Meeks, as president of St. George Company, is in contempt of this court's order of August 28, 1980, for failing to produce the required information and records as provided therein and that he stand committed to the custody of the United States Marshal until he purges himself of this contempt by complying with this court's order of August 28, 1980, and producing the following records and materials for the Internal Revenue Service:

> The following described books, records, papers, and other data of the St. George Company for

the fiscal years ended June 30, 1977, and June 30, 1978:

1. Corporate minute book;
2. Any and all books and records and statements concerning corporation assets and liabilities;
3. Any and all books and records and invoices concerning corporation income and expenses;
4. All bank statements, cancelled checks and deposit slips from July 1, 1976, through August 31, 1978;
5. All savings account statements and passbooks from July 1, 1976, through August 31, 1978, and
6. Any and all payroll records of salaries of wages paid to officers or employees including cancelled checks and bank statements.

DATED this 25th day of November, 1980.

/s/ D. W. Suttle
Senior United States
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-79-CA-287

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., INTERNAL REVENUE AGENT

vs.

GEORGE W. MEEKS, AS PRESIDENT
OF ST. GEORGE COMPANY

Filed Nov. 25, 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING ORDER HOLDING RESPONDENT IN CONTEMPT

On November 25, 1980, hearing was resumed on the court's order for the respondent to show cause why he should not be held in contempt for failure to comply with this court's order of August 28, 1980. After hearing the testimony and evidence, the court makes the following findings of fact and conclusions of law. Any conclusion of law deemed to be a finding of fact is adopted as such. Conversely, any finding of fact deemed to be a conclusion of law is adopted as such.

FINDINGS OF FACT

1. On October 30, 1979, after a hearing, the court entered an order requiring respondent to produce

for the Internal Revenue Service, on November 16, 1979, records and materials requested in the summons that is the subject of this proceeding. The order further provided that, if he failed to comply with the Order, respondent was to appear on December 11, 1979, to show cause why he should not be held in contempt of court.

2. The respondent filed a notice of appeal from this court's order of October 30, 1979. The respondent also filed a motion to stay that order pending a decision by the United States Court of Appeals for the Fifth Circuit.

3. On November 28, 1979, the court signed and entered an order granting respondent's motion for stay pending appeal. On March 11, 1980, the respondent's appeal was dismissed for want of prosecution for his failure to file a timely appellate brief.

4. On August 28, 1980, this court entered an order that provided in part as follows:

> It is, therefore, ORDERED that Respondent, George W. Meeks, produce the following records and materials requested in the summons that is the subject of this proceeding for the Internal Revenue Service on the 6th day of October, 1980, at 9:00 A.M., at the Internal Revenue Service Office at 727 E. Durango Blvd., Room A-210, San Antonio, Texas:
>
> > The following described books, records, papers, and other data of the St. George Company for the fiscal years ended June 30, 1977, and June 30, 1978:
> >
> > 1. Corporate minute book;
> > 2. Any and all books and records and statements concerning corporation assets and liabilities;

3. Any and all books and records and invoices concerning corporation income and expenses;

4. All bank statements, cancelled checks and deposit slips from July 1, 1976, through August 31, 1978;

5. All savings account statements and passbooks from July 1, 1976, through August 31, 1978, and

6. Any and all payroll records of salaries of wages paid to officers or employees including cancelled checks and bank statements.

It is further ORDERED that Respondent is to appear before this Court at 10:00 A.M., on the 10th day of November, 1980, 1980 [sic], unless notified to the contrary prior to such time by the Clerk of the Court, for a hearing to be held for Respondent to show cause why he should not be held in contempt for failure to comply with this order.

5. The hearing on November 10, 1980, was recessed until November 25, 1980.

6. The respondent has failed to produce the records and materials which the court has ordered him to produce.

7. The court has afforded respondent an opportunity to testify during the hearings held on October 30, 1979, on November 10, 1980, and on November 25, 1980. However, respondent has refused to be sworn and to give testimony under oath.

8. The records sought by the Internal Revenue Service exist or were in existence prior to June 12, 1979, the day the Internal Revenue Service Summons was issued.

9. During the direct interrogation of Albert Rodriguez, Jr., Internal Revenue Service Agent on November 10, 1980, by counsel for the government, the following questions were asked in connection with the meeting that took place between respondent and Rodriguez on October 6, 1980:

> Did you ask Mr. Meeks if records were compiled for the St. George Company?
>
> Did you ask Mr. Meeks who prepared the St. George Company records?
>
> Did you ask Mr. Meeks if St. George Company had a general ledger?
>
> Did you ask Mr. Meeks if St. George Company had a cash disbursements journal?
>
> Did you ask Mr. Meeks if St. George Company had a purchaser's journal?
>
> Did you ask Mr. Meeks if St. George Company had payroll records?
>
> Did you ask Mr. Meeks if he had located the St. George Company Corp. minute book?
>
> Did you ask Mr. Meeks whether or not the St. George Company records were on a computer or whether the records were reported manually?

10. The respondent refused to respond to these eight questions on October 6, 1980, and asserted a Fifth Amendment right not to answer Mr. Rodriguez, stating that such testimony might tend to incriminate him.

CONCLUSIONS OF LAW

1. Jurisdiction is proper in this court.

2 Since the respondent has foregone his opportunity to appeal the enforcement order of October 30, 1979, the constitutional validity of that order is no

longer open to question. *United States* v. *Ofe*, 572 F.2d 656 (8th Cir. 1978); *United States* v. *Wodtke*, 543 F.2d 43 (8th Cir. 1976); *United States* v. *Secor*, 476 F.2d 766 (2d Cir. 1973).

3. One who is charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to perform or comply. A court will not imprison a witness for failure to produce documents that he does not have, unless he is responsible for them or is impeding justice by not explaining what happened to them. *United States* v. *Joyce*, 498 F.2d 592, 596 (7th Cir. 1974).

4. An IRS summons imposes a duty to retain possession of summoned documents pending a judicial determination of the enforceability of the summons. Self-induced inability to perform is not a defense to a contempt proceeding. *United States* v. *Asay*, 614 F.2d 655, 660 (9th Cir. 1980).

5. The respondent's failure to present evidence of his inability to comply with the enforcement order is not excused by *Curcio* v. *United States*, 354 U.S. 118 (1957). *See United States* v. *Hankins*, 581 F.2d 431, 437 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

6. The respondent having failed to submit acceptable proof of his claimed inability to comply with this court's order of August 28, 1980, this court has no alternative but to adjudge the respondent in civil contempt.

Dated this 25th day of November, 1980.

/s/ D. W. Suttle
Senior United States
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE OFFICER,

v.

GEORGE W. MEEKS, As President
of St. George Company

ORDER

Upon petition, the exhibits attached thereto, the affidavit of Albert Rodriguez, Jr., Revenue Officer (hereinafter referred to as Petitioner Agent), and upon the Motion of Jamie C. Boyd, United States Attorney, it is

ORDERED that George W. Meeks, as President of St. George Company, (referred to as Taxpayer) appear at the Office of Petitioner Agent, at Room A-210, Federal Building, 737 East Durango Boulevard, San Antonio, Texas, at 9:00 A.M., on September 13, 1979, for the purpose of obeying the summons served upon the said Taxpayer requiring him to appear and give testimony relating to the tax liability or the collection of the tax liability of said Taxpayer and to bring with him all documents and records in his possession or control which are necessary to enable a representative of the Internal Revenue Service to complete his federal tax returns

(a blank federal tax return was attached to the summons to guide the Taxpayer). In the event said Taxpayer fails to appear before the Petitioner Agent at the time and place hereinabove set forth, or fails at such time and place to produce the information and records required by said summons, it is further

ORDERED that the said George W. Meeks appear before the United States District Court for the Western District of Texas, San Antonio Division on the 18th day of September, at 10:00 A.M., and show cause why he failed to appear at the time and place designated in this Order and why he should not be directed to produce the records and documents listed in said Order.

IT IS FURTHER ORDERED that the United States Marshal or Deputy United States Marshal serve this Order on the said George W. Meeks together with the Petition and the exhibits attached hereto.

ENTERED this the 21st day of August, 1979, at San Antonio, Texas.

/s/ D. W. Suttle
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE AGENT

v.

GEORGE W. MEEKS, As President
of St. George Company

AMENDED ORDER

Upon petition, the exhibits attached thereto, the affidavit of Albert Rodriguez, Jr., Internal Revenue Agent, (hereinafter referred to as Petitioner Agent), and upon the Motion of Jamie C. Boyd, United States Attorney, it is

ORDERED, that George W. Meeks, as President of St. George Company, (referred to as Taxpayer) appear at the Office of Petitioner Agent, at Room A-210, Federal Building, 727 East Durango Boulevard, San Antonio, Texas, at 9:00 A.M., on September 13, 1979, for the purpose of obeying the summons served upon the said Taxpayer requiring him to appear and give testimony relating to the tax liability or the collection of the tax liability of said Taxpayer and to bring with him all documents and records in his possession or control which are necessary to enable a representative of the Internal Revenue Service to complete his federal tax returns (a

blank federal tax return was attached to the summons to guide the Taxpayer). In the event said Taxpayer fails to appear before the Petitioner Agent at the time and place hereinabove set forth, or fails at such time and place to produce the information and records required by said summons, it is further

ORDERED that the said George W. Meeks appear before the United States District Court for the Western District of Texas, San Antonio Division on the 18th day of September, at 10:00 A.M., and show cause why he failed to appear at the time and place designated in this Order and why he should not be directed to produce the records and documents listed in said Order.

IT IS FURTHER ORDERED that the United States Marshal or Deputy United States Marshal serve this Order on the said George W. Meeks together with the Petition and the exhibits attached hereto.

ENTERED this the 28th day of September, 1979, at San Antonio, Texas.

/s/ D. W. Suttle
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE AGENT
PETITIONERS

v.

GEORGE W. MEEKS, As President
of St. George Company
RESPONDENT

ORDER

On the 30th day of October, 1979, came on to be heard the above-entitled and numbered summons enforcement action. Both parties appeared at such hearing, and

It appearing to the Court, after hearing the evidence, that Respondent failed to produce the records and materials sought by the Internal Revenue Service summons, and failed at the hearing to show cause why he should not be compelled to produce such records and documents,

It is, therefore, ORDERED that Respondent produce the records and materials requested in the summons subject of this proceeding for the Internal Revenue Service on the 16th day of November, 1979, at 10:00 A.M., at the Internal Revenue Service Office at 727 E. Durango, Room A-210, San Antonio, Texas.

It is further ORDERED that Respondent is to appear before this Court at 2:00 P.M., on the 11th day of December, 1979, unless notified to the contrary prior to such time by the Clerk of the Court, for a hearing to be held for Respondent to show cause why he should not be held in contempt for failure to comply with this Order.

Entered this the 30th day of October, 1979.

/s/ D. W. Suttle
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.

v.

GEORGE W. MEEKS, As President
of St. George Company

DECLARATION

George W. Meeks, the respondent, declares

I have provided the Internal Revenue Service, in the person of Mr. Albert Rodriguez, such records of the St. George Company as are covered in the administrative summons and the ensueing Court Order as are in my possession.

The St. George Company, a corporation under the laws of the state of Texas conducted business from August 1976 through June of 1977 only. There are, therefore, no corporate records for time periods prior to, or subsequent to those dates.

I do not have in my possession or control any of the books, records, or papers of the St. George Company which are called for in the summons and court order in question; other than those which have already been submitted to Mr. Rodriguez. Further, I must respectfully decline to answer any further questions concerning these documents, on the advise of Counsel, on the grounds that the answers to such

questions may tend to incriminate me and are thus privileged under the Fifth Amendment to the Constitution of the United States.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

/s/ George W. Meeks
GEORGE W. MEEKS
Respondent

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 358981 709

Opposition

81-1063

Office - Supreme Court,
FILED
JAN 30 1982
ALEXANDER L. STEV
CLERK

No.

In the Supreme Court of the United States

SPRING TERM, 1982

UNITED STATES OF AMERICA AND
ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE SERVICE AGENT, PETITIONERS

v.

GEORGE W. MEEKS, AS PRESIDENT,
ST. GEORGE COMPANY

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RONALD P. GUYER
MCDONALD, KARAM & GUYER
432 Dwyer Avenue
San Antonio, Texas 78204
(512) 224-2100

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that a respondent, in a civil contempt proceeding, who contends he is unable to comply with the order of the court directing him to comply with an Internal Revenue Service summon, may establish his inability to comply by filing with the court a declaration sworn to under penalty of perjury that he is unable to produce the summoned documents, and asserting his Fifth Amendment privilege against self incrimination.

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TABLE OF AUTHORITIES

1. *Curcio v. United States,* 354 U.S. 118 (1957).
   REF. PG. 9, 11, 12

2. *Maggio v. Zeitz*, 333 U.S. 56 (1948).
   REF. PG. 6, 7, 8, 9, 10
3. *McPhaul v. United States*, 364 U.S. 372 (1960).
   REF. PG. 6, 9
4. *United States v. Austin-Bagley Corp.*, 31 F. 2d. 229 (2d Cir. 1929).
   REF. PG. 9
5. *United States v. Freedom Church*, 613 F. 2d. 316 (1st Cir. 1979).
   REF. PG. 8
6. *United States v. Meeks*, 642 F. 2d. 733 (5th Cir. 1981).
   REF. PG. 2, 5, 11, 12
7. *United States v. O'Henry's Film Works, Inc.*, 598 F. 2d. 313 (2d Cir. 1979).
   REF. PG. 9
8. *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed. 2d. 112 (1964).
   REF. PG. 8
9. *United States v. Rylander*, 656 F. 2d. 1313 (9th Cir. 1981).
   REF. PG. 8, 9, 12

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT
REF. PG. 3, 4, 5, 6, 8, 9, 10, 11, 12

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.):
Section 7402(b) REF. PG. 3
Section 7604(a) REF. PG. 3

In the Supreme Court of the United States

SPRING TERM, 1982

UNITED STATES OF AMERICA AND
ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE SERVICE AGENT, PETITIONERS

v.

GEORGE W. MEEKS, AS PRESIDENT,
ST. GEORGE COMPANY

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ronald P. Guyer, on behalf of George Meeks, responds to petitions for a writ of certiorari to preview the judgment of the United States Court of Appeals for the Fifth Circuit in this case, filed by the Solicitor General, on behalf of the United States of America and Albert Rodriguez, Jr., Internal Revenue Service Agent.

OPINIONS BELOW

The opinion of the court of appeals (App. B, infra, 3a-28a) is reported at 642 F.2d 733. The order of the district court holding respondent in contempt (App. D, infra. 31a-32a) and the district court's findings of fact and conclusions of law (App. E, infra, 33a-37a) are not reported. Prior orders of the district court (App. F, G, H, infra, 38a-43a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1a-2a) was entered on February 10, 1981 and explanatory opinions were issued on April 17, 1981 (App. B, infra, 3a-28a) The Petition For Writ of Certiorari was filed on December 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . .

26 U.S.C. 7402(b) provides:

> If any person is summoned under the internal revenue la..s to appear to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other d: ...

26 U.S.C. 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear to testify, or to produce books, papers, records or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

STATEMENT

A summons to produce records and materials for the St. George Company, Inc., was issued to George W. Meeks as President, on June 12, 1979, ordering him to appear and testify before I.R.S. agents (App. D, infra 31a-32a). Respondents did not produce the records, and a United States District Judge for the Western District of Texas issued a Order to enforce summons for the requested documents (App. G, infra 40a-41a). Respondent met with agents of the I.R.S. on several occasions, and produced documents for their inspection; however, the documentation that he did produce did not satisfy the agents' interpretation of the extent of their request (App. I, infra 44a-45a).

Respondent asserted his Fifth Amendment Right to refuse to answer certain questions of the I.R.S. agents at meetings with the I.R.S. on June 27, 1979, September 13, 1979, and October 30, 1979. A United States District Judge conducted a Show Cause Hearing on October 30, 1979 concerning the summons enforcement order. The government presented evidence pursuant to their statutory requirements. At the conclusion of the hearing, the District Court ordered production of the documents originally requested in the June 12, 1979 summons (App. G infra 44a-45a). Respondent gave notice of appeal, which was dismissed on March 11, 1980, when Respondent failed to file his brief (App. D, infra 31a-32a; App. E, infra 33a-37a).

On August 28, 1980, the District Court entered an additional order to produce documents, and ordered the Respondent to comply with this order by October 6, 1980 or appear in Court on November 10, 1980 to show cause why he should not be held in contempt of court (App. E, infra 33a-37a). On November 10, 1980, after Respondent being unable to comply with the order of the Court, appeared and filed his declaration stating his inability to comply with the

Court's order, and again asserting his Fifth Amendment Right to remain silent (App. H, infra 44a-45a). The District Court adjourned the hearing until November 25, 1980, at which time Respondent again relied upon his declaration of inability to produce the documents and his Fifth Amendment Right to remain silent (App. E, infra 33a-37a). The United States District Court entered an order together with findings of fact holding the Respondent in contempt of court for failing to produce the documents, and "having failed to submit acceptable proof of his claimed inability to comply with this Court's Order" (App. D, E, infra 31a-37a). Respondent had appeared in court and at his conferences with I.R.S. agents pro se, until December 16, 1980, at which time notice of appeal was filed from the Court's order of contempt by his present counsel (see October 30 TR, November 10 TR and November 25 TR).

The Fifth Circuit Court of Appeals, by a percurium order, vacated the District Court's Order of contempt on February 10, 1981, and filed their opinion in support of the order on April 17, 1981 (App. A and B, infra 1a-28a).

ARGUMENT

Respondent Meeks was held in Contempt of Court for failing to comply with an Order of the District Court to produce records for inspection by the I.R.S. Respondent contends that he is and was unable to produce the requested documents and that in order to protect his Fifth Amendment rights he executed and filed a declaration under penalty of perjury stating his inability to comply with the Court's Order and his further reliance upon his Fifth Amendment Rights. Prior to the filing of Respondents Declaration, on November 10, 1980, Respondent had asserted his Fifth Amendment privilege to refuse to answer questions from an I.R.S. Agent during interviews conducted on June 27, 1979, September 13, 1979, and October 6, 1980, in addition, Respondent explained his inability to produce the requested documents. Respondent Meeks, timely asserted his rights provided him by the Fifth Amendment to the Constitution of the United States (App. E, infra 33a-37a; October 30, 1979 TR 89-91, September 13, 1979 TR 9, 11-12).

The Government contends that the Respondent is barred from asserting his inability to comply with the Court's Order because the issue of ability to comply is *res judicata* based upon an enforcement hearing for the original summons. The government relies upon *Maggio v. Zeitz*, 333 U.S. 56 (1948) and *McPhaul v. United States*, 364 U.S. 372 (1960). The government's reliance upon these two cases are misplaced.

In *McPhaul v. U.S.*, the defendant asserted a timely Fifth Amendment defense to the production of documents pursuant to a subpoena issued by a sub-committee of the Congress of the United States. However, the important distinction, and one which is crucial to the issues presented in the instant case, is that McPhaul presented no evidence or explanation for the non-production of the requested

documents. Meeks filed his Declaration on November 10, 1980, and prior to that date had advised agents of the I.R.S. of his inability to produce requested documents.[1] Meeks did not stand mute; he affirmatively stated in his declaration his inability to produce the requested documents.

The government relies upon *Maggio v. Zeitz* (supra) for the proposition that the failure to raise the defense of inability to comply with the summons should be raised at the enforcement hearing, and if no such defense is raised, the Court may presume the ability of compliance. The *Maggio* case involved a finding of civil contempt when Maggio failed to "turn over" assets of a bankrupt estate to the trustee in bankruptcy after a hearing in bankruptcy court concerning the "turn over order." There was no statutory authorization for a "turn over order," but the procedure had been judicially created pursuant to the broad mandate of the obligations and duties of the bankruptcy court. After the "turn over" hearing the referee found that:

> "the trustee established by clear and convincing evidence that the merchandise herein after described, belonging to the estate of the bankrupt, was knowingly and fraudently concealed by the respondent (Maggio) from the trustee herein and that said merchandise is now in the possession or under the control of the respondent."
> *Maggio v. Zeitz*, 333 U.S. 56, at p. 59.

The contempt proceeding for Maggio's failure to "turn over" the requested assets was held in the United States District Court which had jurisdiction to hear the contempt action. At the contempt hearing before the United States District Judge, Maggio raised the defense of inability to comply with the Order of the Referee. The facts in the

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[1] Respondent Meeks declared his inability to produce a majority of the documents at meetings with I.R.S. agents on June 27, 1979, September 13, 1979, and October 6, 1980. (App. E, infra 33a-37a; October 30, 1979 TR 89-91; September 13, 1979 TR 9, 11-12).

instant case differ greatly than the facts dealt with by the Court in Maggio. The proceedings in Maggio were first held in bankruptcy court and involved a preliminary proceeding which did not have the statutory authorization that an I.R.S. summons enforcement has. The contempt order in Maggio was entered by a different court than had made the fact findings, whereas in the instant case the United States District Court handled both the summons enforcement and the resulting contempt action. In Maggio, the Referee entered specific finding that Maggio had knowingly and fraudulently concealed the property, and that the property was *then* in the possession or under the control of Maggio. The District Court entered a summons enforcement order for Meeks on October 30, 1979, but made no factual findings concerning the records (App. H, infra 42a-43a). The Court in *Rylander* considered the procedure for a summons enforcement and noted as follows:

> "... When the I.R.S. seeks to enforce a summons, its burden is very light; it need only show 'that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Internal Revenue Code have been followed.' *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248; 254-255, 13 L.Ed. 2d. 112 (1964). The I.R.S. need not show that the information sought is in the possession of the person summoned. *United States v. Freedom Church*, 613 F.2d. 316, 322 (1st Cir. 1979)."

In the instant case the District Court did make a finding of fact that the records which the I.R.S. sought did exist; however, the finding of fact was limited to that narrow issue. This finding of fact was not made and entered with the summons enforcement hearing but was made and entered in support of the order adjudging Respondent in Contempt for failing to produce the records after Respondent had raised the defense of inability to produce the records and asserted his rights under the Fifth

Amendment. The Court's finding of fact was specifically that the records exist or existed on the date of the issuance of the summons. The Court made no finding that the Respondent possessed or had possessed the records, or that the records were under his control. At the enforcement hearing the Respondent's ability to comply was not litigated nor was it specifically addressed by the Court. The Respondent is not estopped from raising this defense at a contempt hearing. *United States v. Rylander,* 656 Fed. 1313, 1318 (9th Cir. 1981). The fact that Respondent has raised a *bona fide* fifth amendment claim clearly distinguishes the facts of the instant case from the facts recited in *Maggio v. Zeitz,* (supra).

The Respondent presented adequate proof of his inability to comply with the Court's order to produce records by filing his declaration. *United States v. O'Henry's Film Works, Inc.,* 598 Fed. 313, *United States v. Rylander,* (supra), and *Curcio v. United States,* 354 U.S. 118 (1957). The Second Circuit Court of Appeals in *O'Henry's Film Works, Inc.,* relying upon *Curcio* and *McPhaul* noted that:

"... an agent must identify the documents he does produce because 'testimony auxiliary to the production is as unprivileged as are the documents themselves.' *United States v. Austin-Bagley Corp.,* 31 F.2d. 229, 234 (2d. Cir. 1929). Just as an agent's identification of documents he has produced 'merely makes explicit what is implicit in the production itself', *Curcio, supra,* 354 U.S. 118 at 125, 77 S. Ct. at 1150, so does an agent's statement that he does not possess documents he has failed to produce make explicit what is implicit in the nonproduction. Because the agent's testimony is unprivileged, it is not a waiver of his privilege against self-incrimination as to other matters. The agent cannot be interrogated further unless, at this point, he voluntarily waives his Fifth Amendment privilege or is granted immunity. The Government is then free to attempt to establish by extrinsic evidence that the documents exists in the agent's custody or control, or that the agent destroyed the documents."

In considering the Respondent's "testimony auxiliary to his non production" (O'Henry's Film Work's Inc., p. 318)

and what credibility it should be given, a guide is provided in Justice Jackson's opinion in *Maggio v. Zeitz,* 333 U.S. 56 at p. 76:

"... The credibility of his denial is to be weighed in the light of his present circumstances. It is everywhere admitted that even if he is committed, he will not be held in jail forever if he does not comply. His denial of possession is given credit after demonstration that a period in prison does not produce the goods. The fact that he has been under the shadow of prison gates may be enough, coupled with his denial and the types of evidence mentioned above, to convince the court that his is not a wilful disobedience which will yield to coercion."

Respondent was jailed on November 25, 1980, and remained in the Bexar County Jail, without a key for his own release, until February 12, 1981, two days after the Fifth Circuit Court of Appeals vacated the District Court's Order of Contempt. Respondent was imprisoned for failing to waive his Fifth Amendment Rights and explain his inability to produce the requested documents. The District Court found that Respondent had failed to produce the records as ordered.[2] The District Court further found that the Respondent had refused at three hearings to give testimony under oath and had asserted his Fifth Amendment Rights.[3] The last finding of fact the District Court made was that Respondent had "failed to submit acceptable proof" of inability to comply with the court's order.[4]

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[2]"The respondent has failed to produce the records and materials which the court has ordered him to produce." (App. E, infra 33a-37a, No. 6 p. 35a).

[3]"The court has afforded respondent an opportunity to testify during the hearings held on October 30, 1979, on November 10, 1980 and on November 25, 1980. However, Respondent has refused to be sworn and to give testimony under oath." (App. E, infra 33a-37a, No. 7 p. 35a).

[4]"The respondent having failed to submit acceptable proof of his claimed inability to comply with this court's order of August 28, 1980, this court has no alternative but to adjudge the respondent in civil contempt."

The circumstances which Respondent found himself facing in Novmeber of 1980 were no different than those presented to Mr. Curcio when he failed to deliver records to a grand jury pursuant to a subpoena. Both had been given a valid order to produce documents; both expressed their inability to produce the documents; in both cases the issue of the existence of the documents was established. In the instant case, the court entered its finding of fact in support of the contempt proceedings, and *Curcio* testified that "the union had books and records." *Curcio v. United States,* 354 U.S. 118, 119. In both cases, the corporation and the union, had no right to assert a fifth amendment privilege for nonproduction due to possible incrimination. In both cases, the custodians had no personal privilege under the fifth amendment to refuse to produce the requested materials if able to do so. In both cases, the fifth amendment was asserted in conjunction with the testimony auxiliary to the nonproduction of the records. Meeks was held in contempt of court as was *Curcio;* the government has failed to distinguish the application of the assertion of the defense of inability to comply and the rights under the fifth amendment as applied in *Curcio* and the instant case.

The majority of the Fifth Circuit panel in *United States v. Meeks,* 642 F2d. 733, concluded that Respondent did not have the ability to purge himself of the civil contempt and therefore the only choice Respondent had was to forego his constitutional rights.[5] In his dissent, Judge Reavley was of the opinion that Respondent could purge himself of contempt by first producing the documents. Meeks swore in his declaration subject to perjury that he could not produce the documents. Were he to produce the documents to purge himself of contempt, Respondent would surely find himself back in jail after being convicted of perjury. Second, Respondent could prove his inability to comply by evidence from third persons.

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[5] *United States v. Meeks,* 642 F.2d. 732, 736, App. B infra 3a-2a, 10a.

This alternative is based on pure speculation that such third persons exist and are available to the Respondent. To this suggestion the Court in *Rylander* noted:

". . . If there are no third persons who could testify as to the whereabouts of the documents, Rylander would be forced to submit to incarceration or run the risk of incriminating himself. It is exactly this dilema which the Fifth Amendment is designed to protect against. See *Curcio v. United States*, 354 U.S. 118, 123-124, 128; *Rylander*, 656 F.2d. 1313, 1319.

As a basis for disagreement Judge Reavley ponders the effect of the majorities opinion as does the government in their brief to this court. Even if the decision of *United States v. Meeks* or *United States v. Rylander* did create a "roadmap for future evasion of lawful process" or if it even hampered the ability of the I.R.S. to assess tax liability, these are not legitimate reasons for this court to accept review of the instant case. Judge Reavley together with the govemnent is suggesting that the constitutional rights of citizens be ignored so that the I.R.S. may expidiciously collect taxes. The power and resources of the federal government are awesome as compared to those of individual citizens. The Bill of Rights was designed to protect citizens from the awesome governmental power and resources and the rights of citizens should not be diminished under the weight of pressing governmental pressure. Without singling out the fifth amendment as being the most precious right in our constitution, for depending upon the circumstance, each of them is precious, when faced with a summons to produce records and with an order from a district judge to produce the requested records Respondent found that his only refuge was in the Fifth Amendment. He asserted that right in good faith and should not be compelled to give up that right.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RONALD P. GUYER
Attorney for George Meeks

January, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 80-2370

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., PLAINTIFFS-APPELLEES

v.

GEORGE W. MEEKS, AS PRESIDENT OF
ST. GEORGE COMPANY, DEFENDANT-APPELLANT

Feb. 10, 1981

Appeal from the United States District Court for the Western District of Texas; Dorwin W. Suttle

Before CHARLES CLARK, REAVLEY, and WILLIAMS, Circuit Judges.

PER CURIAM:

The order adjudging appellant George W. Meeks in contempt of court for failure to produce records of the St. George Corporation or to explain why he cannot produce them, and ordering his confinement until he purges himself of contempt is VACATED.

Vacating this order does not bar proceedings undertaken to determine if appellant should be adjudged guilty of criminal contempt and confined for a fixed term for failure to obey the order of the court to produce the records. Any finding of contempt, however, cannot be grounded upon an assertion of the privilege against self-incrimination by Meeks

when asked to explain why he cannot now produce such records.

Full opinion will be submitted later. Judge Reavley dissents.

ORDER VACATED.

Opinion issued, 5th Cir., 642 F.2d 733.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 80-2370

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., PLAINTIFFS-APPELLEES

v.

GEORGE W. MEEKS, AS PRESIDENT OF
ST. GEORGE COMPANY, DEFENDANT-APPELLANT

April 17, 1981

Appeal from the United States District Court
for the Western District of Texas

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

On February 10, 1981, slip op. 5993, —— F.2d ——, this Court vacated an order of the United States District Court for the Western District of Texas adjudging appellant George W. Meeks in contempt of court for failure to produce records of the St. George Corporation or to explain why he could not produce them, and ordering his confinement until he purged himself of contempt. The brief opinion by the Court issued on that date indicated that an explanation of the decision of the Court would follow, and this opinion is that explanation.

Appellant George W. Meeks was the president and one of two stockholders of the St. George Corporation which was under investigation by the Internal Revenue Service in the spring of 1979. On June 12, 1979, the Court ordered Meeks to produce records of the corporation. In response to this order Meeks appeared in person before an IRS agent on June 22, 1979. At that time he indicated he had access to a great many corporate records, that there were boxes and boxes of records, and he made inquiry concerning and requested transactional immunity. Immunity was not granted.

On August 21, 1979, the district court ordered him to appear before the IRS on September 13 and produce the records. It further ordered that if he failed to appear he was directed to appear in the district court to show cause why he had failed to comply. Meeks did appear before IRS agent Albert Rodriguez, Jr. on September 13, 1979. He produced some twenty documents which were of little or no use in the tax investigation. He then told the agent that he did not have and could not locate other corporate records. He indicated that possibly some records might be reconstructed and that a substantial amount of the records might have been destroyed because of difficulty with the computer in which they had been entered.

At the show cause hearing later in the month of September 1979, Meeks made various motions, and the show cause portion of the hearing was finally set for October 30, 1979. On that date the district court denied all of Meeks' motions and issued an order requiring him to produce the documents on November 16, 1979. Three days before that scheduled court appearance he filed a notice of appeal from the

October 30 order and a motion for stay. The stay was granted.

On March 11, 1980, the Court of Appeals dismissed Meeks' appeal for want of prosecution and for failure to file his brief. Over five months later, on August 22, 1980, the IRS filed a motion for an order to enforce the summons for the documents. The district court ordered Meeks to produce the records on October 6, 1980. He appeared on October 6 but refused to answer any specific questions about the whereabouts of its records on the ground that the answers might tend to incriminate him.

At a show cause hearing on November 25, 1980, Meeks refused to testify but submitted a declaration to which he was willing to swear that he had provided the IRS with all of the records which he had in his possession which were covered by the order. He refused to answer any further questions concerning the documents on the ground the answers might tend to incriminate him. The court refused to accept the declaration. It found that the records did then exist or, in the alternative, had been in existence prior to the June 12, 1979, summons. It further found that Meeks had failed to submit acceptable proof of his claimed inability to comply, and adjudged him in civil contempt. His confinement was ordered until he purged himself of the contempt by complying with the summons either by producing the records or testifying to explain why he could not produce them. This is the order which was appealed.

There is some evidence in the record which can justify a finding of fact that the records were in existence at the time of the original summons. As to evidence that they did not exist at the time Meeks was sentenced to civil contempt, he has said over and over again that they do not exist and in his submit-

ted statement which was to be sworn this was indicated. In addition, in his talk with agent Rodriguez on September 13, 1979, he stated that the documents were not in existence or at least were not in his possession and that he could not locate them.

It is the position of the IRS that the only way Meeks could purge himself of contempt was to produce the records or to explain why he could not produce them. Further, it is asserted the burden was on Meeks to prove that he could not produce the records. To the contention by Meeks that explaining what had happened to the records would require him to sacrifice his claim of privilege against self-incrimination, the IRS is unmoved. The Service asserts that Meeks' proof that he cannot comply with the summons is inadequate.

In *United States* v. *Hankins*, 565 F.2d 1344 (5th Cir. 1978); 581 F.2d 431 (5th Cir. 1978), this Court upheld a civil contempt order with an indefinite period of confinement in a case with similar facts. In that case, Hankins was ordered to turn over partnership records. He claimed the privilege against self-incrimination as against the obligation to produce the documents. This claim obviously was not effective because these were business documents and not personal documents. It is elementary that the claim of the privilege is a personal one and does not extend to the activities of a business entity, including a partnership, of which the person subpoenaed is or was a part. *Bellis* v. *United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974).

At a contempt hearing Hankins offered to testify as long as he was not cross-examined and this offer was refused. It is important, however, to note that he made no claim of the privilege against self-incrimination as it related to testimony as to what

happened to the missing ledger pages which were involved in the order. *United States* v. *Hankins*, *supra* at 565 F.2d 1344.

In the *Hankins* case a motion for rehearing en banc was then denied by the Court, but the Court wrote a clarifying opinion. The Court confirmed that the records involved were business records and that Hankins could not claim the privilege with respect to them. This was the basic thrust of the revised opinion. *United States* v. *Hankins*, 581 F.2d 431 (5th Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979). In a footnote the Court opinion made clear that it saw Hankins' attempt to jusify his refusal to respond to the summons actually was an attempt to relitigate the district court's earlier specific finding based upon lawful evidence that Hankins did have the records when the Court ordered the summons enforced.

There are three significant distinctions between the *Hankins* case and the case before the Court. In *Hankins*, the claim of the privilege against self-incrimination was made against the production of documents on the erroneous ground that a person could claim the privilege against the production of the papers of a business entity. There is no indication in the case that Hankins made a specific claim of the privilege against self-incrimination as against a governmental inquiry of what he personally might have done with the documents to make them no longer available. In contrast, in the *Meeks* case the only claim of privilege was the claim made when Meeks was asked to explain what happened to the documents. Meeks never claimed the privilege against the obligation to supply business documents but only against an inquiry as to his personal role with respect to unavailability of the documents.

Further, in *Meeks* it is claimed that as in *Hankins* there is no proof to show that Meeks could not at the time of the show cause hearing produce the documents because his submitted statement to this effect was not accepted. But we also have the testimony of IRS agent Rodriguez that Meeks told him in the official meeting on September 13, 1979, that Meeks could not produce the documents.

Third, contrary to *Hankins*, there was no specific finding by the court before the claim of privilege that at the time of the show cause order he could produce the documents.

Strong support for the position of Meeks in this appeal is found in *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957). In that case the Supreme Court reversed a criminal contempt conviction of an individual for invoking the privilege against self-incrimination in refusing to testify as to the whereabouts of corporate records which he had been ordered to produce. The Court in *Hankins* distinguished *Curcio* on the ground that *Curcio* did not involve a refusal to testify at a contempt proceeding. Further, *Hankins* can be distinguished because Hankins never made clear that his claim of privilege was directed solely against explaining what role he might have played in the fact that records were no longer available rather than a general claim that the records within themselves might incriminate him.

Meeks had a sound reason to decline to offer more than sworn testimony that he did not then have the records and to claim the privilege rather than be forced to explain what might have happened to the records. His was a valid fear that he would be waiving his privilege if he testified that he did not have the records. His concern was confirmed in the third

Hankins case in this Court, *Hankins* v. *Civiletti*, 614 F.2d 953 (5th Cir. 1980). In a habeas corpus proceeding, Hankins had submitted affidavits in the district court asserting his inability to comply with the production order. The Court rejected these affidavits. He then took the stand at the habeas corpus hearing and testified he had complied to the full extent of his current and future abilities. Upon cross-examination he then refused on the grounds of the claim of privilege against self-incrimination to explain what he knew about the missing papers.

In its per curiam opinion this Court concluded, "Clearly, Hankins has waived his fifth amendment privilege with regard to matters relevant to his direct testimony." *Hankins* v. *Civiletti*, *supra* at p. 955. This holding stands firmly for the proposition that if Meeks had testified that he could not produce the records, he would have waived the claim of privilege as to any possible role he might have played in making it impossible to produce them.

The position of the government in this case pushes Meeks into an untenable position. If he does not explain what happened to the records, he must remain in prison. The only key to his release is his explanation. This is the thrust of the civil contempt order. The only way he can be released from prison would be for him to yield his constitutional privilege against self-incrimination.

Stated in terms of the common explanation of civil contempt, the person who is in custody must have the "key to the jail" in his pocket. He must be free to release himself from confinement by complying with the order of the Court. But the only way that Meeks can comply with the order of the Court in this case is to sacrifice a personal constitutional

right. The civil contempt order forces Meeks to remain in jail until he testifies against himself as to matters which might tend to incriminate. This is in direct and specific contravention of the fifth amendment privilege. As the Supreme Court said in *Ullmann* v. *United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956): "[T]he sole concern (of the privilege) is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts." *Id.* at 438, 76 S.Ct. at 506. *See also* the reversal of the civil contempt order for refusing to give testimony in *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Since Meeks could not comply with the court order without sacrificing his properly asserted constitutional right, this Court directed that the civil contempt order be vacated. As we pointed out in our brief opinion on February 10, 1981, the vacating of this order does not bar proceedings undertaken to determine if appellant should be adjudged guilty of criminal contempt and confined for a fixed term for failure to obey the order of the court to produce the records. But a conviction of criminal contempt could not be grounded upon an assertion of the privilege against self-incrimination by Meeks when asked to explain why he cannot now produce such records. *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1967).

This opinion is filed in support of the decision of this Court of February 10, 1981, vacating the order of confinement of George W. Meeks for civil contempt. Judge Reavley dissented from that decision and dissents from this opinion.

REAVLEY, Circuit Judge, dissenting:

George Meeks, as president of the St. George Company,[1] was served an IRS summons on June 12, 1979, directing him to appear before an IRS agent and give testimony relating to the tax liability of that corporation and to produce its books and records.[2] In response to the summons, Meeks appeared in person before two revenue agents on June 22, 1979. He brought with him a number of his corporate records, but would not allow the two agents to examine them unless he, individually, was granted transactional immunity from prosecution.

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[1] The St. George Company, Inc., which was engaged in the auto parts business in San Antonio, Texas, received a certificate of involuntary dissolution from the Texas Secretary of State in March of 1979. That same month, Meeks as president of the St. George Company was notified by letter that the IRS intended to audit the corporate tax return of the St. George Company.

[2] The summons specifically sought the following books, records, papers and other data of the St. George Company for the fiscal years ending on June 30, 1977 and June 30, 1978:

(1) Corporate minute book;

(2) Any and all books and records and statements concerning corporation assets and liabilities;

(3) Any and all books and records and invoices concerning corporation income and expenses;

(4) All bank statements, cancelled checks and deposit slips from July 1, 1976 through August 31, 1978;

(5) All savings account statements and passbooks from July 1, 1976 through August 31, 1978; and

(6) Any and all payroll records of salaries or wages paid to officers or employees including cancelled checks and bank statements.

During the course of the meeting, Meeks commented to the agents that he interpreted the summons to mean that the IRS wanted to see all of the corporate records that existed for the time specified. The agents agreed with this assessment. Thereafter, Meeks indicated that he attempted to bring with him the books and records of the corporation identified in the summons, that he had access to a great many corporate records, that there were "boxes and boxes" of records, and that some of the corporate records requested existed in a computer.[3] The corporate min-

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[3] The June 27, 1979 meeting was tape recorded and later transcribed. The transcription of this meeting was introduced as an exhibit in the show cause hearing on the IRS' petition to enforce the summons. The exhibit reflects that Meeks, in the June 27 meeting, stated:

> ROBINSON: Do you have the books and records of the corporation with you?
>
> MEEKS: I have endeavored to bring with me to the best of my ability the books and records of the corporation that you so identified, however, I think you would admit and recognize that it would be next to impossible to bring every piece of paper that applies to that corporation, to gather it all together in one place and haul it anywhere, it would constitute boxes and boxes of pieces of paper and the physical problem in so doing is rather large. There is also the fact that some of those corporate records exist in a computer and I can't very well pick the computer up and bring it down here to your office either. Or some of them may exist in the computer.
>
> ROBINSON: Mr. MEEKS have you brought any of your records with you?
>
> MEEKS: I have brought a number of my records with me, yes.
>
> ROBINSON: Would you care to allow us to examine them at this time.
>
> MEEKS: I don't believe I can give you just free access to those records under the circumstances, ah you

ute book was the only record requested in the summons that Meeks indicated he did not have in his possession. However, Meeks' answer clearly implied that a corporate minute book did exist.[4] Moreover, Meeks' response that he did not have the minute book in his "possession" is ambiguous since it is not clear whether he did not have it and did not know where it was or who possessed it, or whether he did not have it and could not legally acquire it.[5] Because the

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have previously told me that you will not assist me in protecting my rights.

ROBINSON: I haven't said I would assist you individually in any way.

MEEKS: I know, you said that you will not—

ROBINSON: You're not involved as an individual here at this point.

[4] The transcription of the June twenty-seventh meeting shows the following verbal exchange with respect to the corporate minute book:

ROBINSON: Well Mr. MEEKS, are you prepared to allow us to examine the Corporation minute book at this time?

MEEKS: Ah, I would be more than happy to do so but I do not have the corporate minute book.

ROBINSON: Do you say you don't have it with you or you don't have one?

MEEKS: I do not have it with me because it is not in my possession.

[5] The record reflects that Meeks was both president and treasurer of the St. George Company and that a Ricky Dermody held the positions of vice-president and secretary. Tex. Bus. Corp. Act Ann. art. 2.44 requires each corporation to "keep correct and complete books and records of account and [to] keep minutes of the proceedings of its shareholders and board of directors . . . ." Therefore, it is entirely consistent with Meeks' statement—that the corporate minute book was not in his possession—that the minute book was in Dermody's possession as secretary of the corporation.

agents would not grant him transactional immunity,[6] Meeks, relying on the fourth and fifth amendments, refused to permit them to inspect the records he brought to the meeting.

Thereafter, the IRS sought enforcement of the summons. On August 21, 1979, the district court ordered Meeks to appear before the IRS and give testimony regarding the corporation's tax liability and produce the requested records. On September 13, 1979, Meeks appeared before an IRS agent and produced a few documents, some of which were already in the possession of the IRS.[7] Regarding the other records and data specified in the summons, Meeks stated that the majority of the records requested were not in his possession. When questioned as to who had possession of the elusive records so a summons could be issued for them, Meeks again replied that he did not have them, nor could he locate them, and then he claimed his fifth amendment privilege against self-incrimination. When questioned about the corporation's bank records (statements, cancelled checks, and deposit slips), Meeks claimed he did not have any and could not remember at which bank in San Antonio the corporation kept its account during the fiscal years in question.[8]

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[6] The revenue agents informed Meeks they had no authority to grant his request for transactional immunity.

[7] At the September 13 meeting, Meeks produced sixteen statements from two different auto parts suppliers. Meeks also produced three 941 forms (employer's quarterly tax returns) covering the fourth quarter of 1976 and the first and second quarters of 1977.

[8] Meeks' memory had substantially improved by November 10, 1980, when a hearing was held to show cause for him not being held in contempt. Although not under oath, but while

Later during that September 13 interview, Meeks indicated that some of the records sought by the IRS were entered into a computer and stored on diskettes. According to Meeks, considerable amounts of data were lost from this computer operation and that data was not available to him.[9] Nonetheless, Meeks unequivocally indicated that it might be possible to obtain some or all of the data sought if he could prevent the IRS from conducting a "fishing expedition" by having the agents tell him specifically what information they wanted.[10] The reasonable inference

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representing himself *pro se*, Meeks informed the district judge that the St. George Company had done its banking at the Kelly Field National Bank in San Antonio.

[9] After problems with this computer system, Meeks' company switched to another computer system which uses a hard disk pack to store data. It is not clear from a reading of the record whether the new computer system was instituted before the St. George Company received the certificate of involuntary dissolution. Also, even if the new computer system was installed after the St. George Company ceased to exist, it is not inconceivable that data relevant to the corporation would be stored in the new system since Meeks continued to operate the auto parts business as a sole proprietorship after the involuntary dissolution of the corporation. During the September thirteenth meeting, Meeks only indicated that data from the old computer system was not available to him because the data storing diskettes (floppy disks) of the old computer were not interchangeable with the hard disk pack of the new computer. The inference from Meeks' statements is that the old diskettes still existed. Thus if these diskettes were produced by Meeks, the IRS could have retrieved the sought-after data by locating a comparable computer system.

[10] The transcript of the meeting on September 13, 1979 reads, in pertinent part, as follows:

> MR. MEEKS: At approximately the same time that we initiated the corporation, we endeavored to go on a

from this statement is that Meeks did possess, or had access to, some documents and records from which he

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computer operation. I had never dealt with computers before in my life. Some of the records that you seek were entered into the computer, and the hard copies destroyed. I assume destroyed. The hard copies can no longer be found. We spent a year fighting with the computer. We subsequently had to get a different computer because of problems with it.

MR. RODRIGUEZ: What information—

MR. MEEKS: And much of the data that you want just doesn't—I—I cannot produce.

MR. RODRIGUEZ: What information was entered into the computer, and what type of system is it? Is it tapes, or cards, or—

MR. MEEKS: Well, is [sic] and was—the operation that we have now is on a disc [sic] pack. That is not the computer that we had then. That's not the computer that we had the problems with, that we were losing considerable amounts of data from, that we were having considerable programming problem with.

MR. AREVALO: Is that your computer, or do you all buy time, or—

MR. MEEKS: It is an in-house unit, but it is leased.

MR. AREVALO: Okay.

MR. RODRIGUEZ: And you are saying, then, that the—the data from that computer is not available to you?

MR. MEEKS: No, it is not. The records in that computer were kept on what are generally referred to as floppy discs [sic], or discettes [sic]. The computer operation that we have now, runs on a hard disc [sic] pack, and does have a little tape cassette thing. The old computer had neither the tape cassette, nor the hard disc [sic].

MR. RODRIGUEZ: Uh-huh.

MR. MEEKS: And—

MR. AREVALO: What happened with the print-outs?

could obtain or reconstruct the items and information sought by the IRS.

MR. MEEKS: What few print-outs there are, or were, have nothing to do with the records that you—that you wish to see.

MR. RODRIGUEZ: Well, we asked for all records concerning the corporation's assets, liabilities, incomes, and expenses. That pretty well covers—

MR. MEEKS: Well, I don't think a price list would have to do with an asset, or liability. It's just a list of prices of merchandise, whether the merchandise is there or not. This is the kind of thing that—

MR. RODRIGUEZ: What about inventory?

MR. MEEKS: Inventories were—for some considerable period, were done partially by hand, partially by the computer. It was my intention, when we got the computer, to have it take care of all of that. It didn't work; didn't work at all.

MR. RODRIGUEZ: So then—

MR. MEEKS: I—

MR. RODRIGUEZ: —what information—

MR. MEEKS: I spent—well, never mind. You don't need—you're not interested in that.

MR. RODRIGUEZ: What information is on the computer, though? Income and expenses?

MR. MEEKS: I've avoided bringing something else up here that perhaps I really should. What you're asking me for here is for every piece of data that concerns the company for the time period involved, every invoice, every statement, every—

MR. RODRIGUEZ: That's covered by the summons.

MR. MEEKS: Every piece of paper that exists. And you're now also asking me for every piece of data that might have existed in the computer.

MR. RODRIGUEZ: I'm asking you for the books and records of the corporation.

MR. MEEKS: This—

[Footnote continued on page 18a]

On September 17, 1979, Meeks filed a motion to be excused from complying with the district court's enforcement order, alleging that he had fully complied with the order and had "produced all documents and records in his possession or control *which are necessary to enable a representative of the IRS to complete his federal tax returns. . . .*" (Emphasis added.) A hearing was held on October 30, 1979, for Meeks to show cause why he should not be compelled to produce the requested records and documents. After hearing the evidence, the district court entered an order requiring Meeks to produce the requested records and documents.

On November 13, 1979, Meeks filed a notice of appeal from the district court's enforcement order of October 30, 1979. This court dismissed the appeal for want of prosecution on March 11, 1980, because of Meeks' failure to file a brief. The district court

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[10] [Continued]

MR. RODRIGUEZ: And if they are on a computer, and I'd like to see the print-out, then.

MR. MEEKS: Well, the print-outs don't exist. This makes very much of a fishing expedition. If you would tell me, sir, specifically what information you want—

MR. RODRIGUEZ: I want the general—

MR. MEEKS: —it is possib'e that some or all of that data might be obtainable.

MR. RODRIGUEZ: Uh-huh.

MR. MEEKS: Or maybe even could be reconstructed. I don't know, because I don't know what you want.

MR. RODRIGUEZ: I want the—

MR. MEEKS: You asked for—

MR. RODRIGUEZ: It's outlined in the summons. I want the books of—of the corporation concerning the assets and liabilities. I want the books concerning income. I want the books concerning expenses.

subsequently entered an order on August 28, 1980, requiring Meeks to produce the requested documents and records on October 6, 1980. On that date, Meeks appeared before an IRS agent, but did not produce the records specified in the summons. At that meeting, Meeks did agree to provide certain waivers which would allow the IRS to secure certain bank records. However, when the waivers were mailed back to the IRS by Meeks, the beginning and ending dates were altered so as to make the waivers unacceptable to the IRS.[11]

On November 25, 1980, a hearing was held for Meeks to show cause why he should not be held in contempt for failure to obey the court's enforcement order. Meeks refused to testify in his own behalf to explain the whereabouts of the requested records and documents or answer any questions under oath concerning them on the ground that such testimony might tend to incriminate him. However, Meeks did submit a written declaration to the effect that he did not "have in [his] possession or control any of the books, records, or papers of the St. George Company which are called for in the summons and court order . . . ." [12] Meeks appeals the district court's order adjuding him in civil contempt.

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[11] The record shows that Meeks changed the beginning date on the waivers from July 1, 1976 to August 1, 1976, and that he changed the ending date on the waivers from August 31, 1978 to June 30, 1977. In its summons the IRS sought bank records of the St. George Company for the fiscal years ending June 30, 1977 and June 30, 1978. The IRS required an ending date on the waivers two months past the end of the fiscal year in order to pick up any items from the 1977-78 fiscal year that had not cleared by June 30, 1978.

[12] This statement is blatantly false at least because of the fact that Meeks is in *control* of bank records of the St. George

The majority opinion rightly states that a person held in civil contempt must carry "the 'key to the jail' in his pocket," that is, he must be able to release himself from confinement by complying with the court's order. *See Maggio* v. *Zeitz*, 333 U.S. 56, 68, 68 S.Ct. 401, 407, 92 L.Ed. 476 (1948). I dissent from the court's decision in this case because the majority erroneously concludes "the only way that Meeks can comply with the order of the Court in this case is to sacrifice a personal constitutional right [*i.e.* his right to be free from compelled self-incrimination]." —— F.2d at —— [slip op. at 5997].

Meeks is being held in contempt by the district court for his failure to produce documents and records, not for refusing to testify. He can comply with the court's order either by producing the requested documents and records or by establishing his present inability to comply.[13] Hence, the majority fails to consider that Meeks can comply with the court's order by producing the documents and records. This bespeaks the infirm foundation of the majority opinion, which is the assumption, unsupported by a review of the entire evidence, that Meeks no longer pos-

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Company for the fiscal year ending June 30, 1978, and has not given a waiver for the bank, at which the corporation had an account, to release its records to the IRS relative to the corporation for the 1977-78 fiscal year.

[13] It may well be possible for Meeks to establish his present inability to comply, if indeed that is the case, by evidence other than his own testimony. This possibility goes ignored by the majority and apparently unexplored by Meeks in the proceedings below. If Meeks is indeed unable to comply, and had he been represented by counsel below, such counsel may well have been able to establish Meeks' inability to comply without his testimony.

sessed, or had control over, the documents and records sought.[14] The majority never really addresses the pivotal issue of this case, which is whether the district court was "clearly erroneous" in finding that the documents and records sought exist or were in existence when the summons was issued. The majority does not expressly conclude that the district court's finding regarding Meeks' ability to comply with the order is clearly erroneous. Instead, the majority notes that there is "some evidence in the record" to justify a finding that the documents and records existed when the summons was issued. Then my brethren comment that as to the evidence that the documents and records did *not* exist when Meeks was sentenced to civil contempt, he has said over and over again that they do not exist, and his declaration, to which he would have sworn, indicated this. Finally, as additional "evidence" that the documents and records did not exist, the majority observes that in his talk with the revenue agent on September 13, 1979, Meeks stated "the documents were not in existence or at least were not in his possession and that

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[14] The majority's assumption that Meeks cannot comply with the district court's order also ignores the record. In the September 13, 1979 meeting, Meeks claimed he could not remember at which bank the St. George Company had an account. Well over a year later, Meeks did remember the name of the bank and supplied the IRS with a waiver to permit the bank to release copies of the corporation's statements, cancelled checks and deposit slips dating from August 1, 1976 to June 30, 1977 to the IRS. Therefore, even assuming *arguendo* that the majority's assumption is otherwise correct, Meeks obviously could partially comply with the summons and order by furnishing the IRS with the bank records for the fiscal year ending on June 30, 1978. *See* footnotes 11 & 12, *supra*.

he could not locate them." —— F.2d at —— [slip op. at 5995].

On reviewing the entire evidence, I am not left with a "definite and firm conviction that a mistake has been committed," *B. H. Bunn Co.* v. *AAA Replacement Parts Co.*, 451 F.2d 1254, 1260 (5th Cir. 1971), and I, therefore, cannot conclude that the district court's finding regarding the existence of the documents and records is clearly erroneous. *See* Fed. R.Civ.P. 52(a).

Prior to the district court's enforcement order of October 30, 1979, compelling Meeks to produce the documents and records outlined in the summons, Meeks had filed a motion to be excused from complying with the summons and previous court order requiring production of the documents and records on the ground that he had already complied with the order by producing all such documents and records in his possession. When the district court entered its enforcement order on October 30, it expressly overruled Meeks' motion to be excused from compliance. Hence, the order of October 30, 1979 contains an implicit finding of fact concerning Meeks' ability to comply with the court's order, *i. e.* that the records sought in the summons existed and that Meeks had access to or was in posesssion of them.[15]

This order, entered on October 30, 1979, along with its implicit finding that Meeks had the ability to comply, became final and unreviewable when this court dismissed the appeal of that order for want of prosecution. Therefore, when Meeks appeared on

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[15] *See, e.g., Clinkenbeard* v. *Central Southwest Oil Corp.*, 526 F.2d 649, 650-51 (5th Cir. 1976) (appellate court implied finding of fact on part of district court that must necessarily have been made by the lower court to support its judgment).

November 25, 1980, at the hearing to show cause why he should not be held in contempt for non-compliance with the renewal of the court's order compelling production of the documents and records, he was confronted by a prima facie case that such documents and records continued to exist and remained in his possession or control. *See Maggio* v. *Zeitz*, 333 U.S. 56, 75, 68 S.Ct. 401, 411, 92 L.Ed. 476 (1948). This is so because Meeks cannot now, on appeal from a civil contempt adjudication, attack the original production order since it is res judicata on the issue of his possession of the documents and records at the time it was issued. *Id.; United States* v. *Hankins*, 581 F.2d 431, 437 n.8 (5th Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979).

Once an order establishes prior possession, the reasonable inference with respect to books and records is the continuance thereof. *Maggio*, 333 U.S. at 65-66, 75, 68 S.Ct. at 406, 411. Thus although Meeks could not challenge, at the civil contempt show cause hearing, the previous adjudication of possession, he was not prevented from establishing his lack of present possession of the items enumerated in the court's order. As noted by the Supreme Court in *Maggio*, if the potential contemnor offers no evidence as to his inability to comply with the court's order, or stands mute,[16] he does not meet the issue of estab-

[16] The concealment of assets in any bankruptcy proceeding or the destruction of records or documents pertaining to the bankrupt is a crime punishable by up to five years imprisonment and/or a fine up to $5,000. 18 U.S.C. § 152. In *Maggio*, the Supreme Court of the United States did not seem to be concerned that a bankrupt in a civil contempt proceeding, confronted by a turnover order establishing prior possession, might stand mute, relying on his fifth amendment privilege of self-incrimination, and yet be held in contempt for his failure to establish lack of present ability to comply.

lishing his lack of present possession to overcome the prima facie case. 333 U.S. at 75, 68 S.Ct. at 411. "Nor does he do so by evidence or by his own denials which the court finds incredible in context." *Id.* at 75-76, 68 S.Ct. at 411.

At the hearing to show cause why he should not be held in contempt, Meeks failed to introduce any evidence that the records no longer existed or that he did not presently possess or have access to them. Meeks' uncross-examined declaration is not "evidence." Even considering the record of the October 30, 1979 final order compelling production of the items sought, there is a lack of proof to show Meeks' inability to comply. The majority bases its unarticulated holding that the district court was clearly erroneous in its finding as to the existence of the records [17] on the allegations in Meeks' unsworn motion to excuse himself from compliance and on Meeks' self-serving statements to the revenue agent in the

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[17] Implicit in the district court's finding that the documents and records exist, or were in existence at the time when the summons was issued, is the finding that Meeks had possession or control of them. *See, e.g., Clinkenbeard* v. *Central Southwest Oil Corp.*, 526 F.2d at 650-51 (implying a finding of fact on the part of the district court that must necessarily have been made by the court to support its judgment); *Gilbert* v. *Sterrett*, 509 F.2d 1389, 1393 (5th Cir.), *cert. denied*, 423 U.S. 951, 96 S.Ct. 373, 46 L.Ed.2d 288 (1975) (the district court's findings of fact "should be construed liberally and found to be in consonance with the judgment, so long as that judgment is supported by evidence in the record"); *Rayonier, Inc.* v. *Polson*, 400 F.2d 909, 923 (9th Cir. 1968) (it is not necessary for a district court to make findings asserting the negative of each issue of fact raised; it is sufficient if the affirmative facts found by the court, construed as a whole, negative each requested contention).

September 13, 1979 meeting that he did not have the requested documents and records. The only real "evidence" consists of Meeks' statements to the revenue agent.[18] In making its credibility choice, the district court was entitled to discount these self-serving statements, especially in view of Meeks' contradictory statements during the same meeting that it might be possible for him to obtain some or all of the data sought by the IRS if he could prevent the agents from conducting a "fishing expedition."

If the majority's decision is left to stand, it will enable any individual to defy a court order enforcing an IRS summons to produce documents, so long as he or she claims (by "declaration") a lack of possession or their present nonexistence and then asserts his or her privilege against self-incrimination. The district court is then left only a criminal contempt sanction with which it can enforce its order.[19] Moreover, the majority's decision will permit any party to a civil action to defy a court's order under Fed. R.Civ.P. 37(a)(2) to produce documents for inspection by claiming inability to comply and asserting the fifth amendment privilege against self-incrimina-

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[18] These statements by Meeks that he did not have the requested books and records, which are contained in the transcript of the September 13, 1979 meeting and which were offered by the Government as admissions of a party opponent, Fed.R.Evid. 801(d)(2), to the extent they give aid to the majority's conclusion, could have been rejected with the credibility of Meeks by the trial court, within whose province the making of credibility choices lies.

[19] The penalty for a criminal contempt is six months in jail and/or a fine of $1,000. 18 U.S.C. § 402.

tion,[20] without fear of the sanction of being held in civil contempt. *See* Fed.R.Civ.P. 37(b)(2)(D).

The majority finds strong support in *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957), for the position taken by Meeks in this appeal. I find no support for Meeks' position in the *Curcio* decision because it is inapposite to this case. *Curcio* involved a criminal contempt conviction of a contemnor who was subpoenaed to appear before a grand jury and to give testimony and produce documents. The contemnor appeared but failed to produce the demanded books and records. He did testify that the demanded books and records were not in his possession, but "refused on the ground of self-incrimination, to answer any questions pertaining to the whereabouts, or who had possession, of the books and records he had been ordered to produce." 354 U.S. at 119, 77 S.Ct. at 1147. It was this refusal to testfy concerning the whereabouts of the documents for which contemnor was adjudged guilty of criminal contempt by the district court.

The Supreme Court in *Curcio* held that the contemnor, who as the custodian of a labor organization's books and records, could not be punished for invoking his fifth amendment privilege against self-incrimination. The court reasoned that, although the contemnor was not entitled to the privilege with respect to production of the records themselves, he was entitled to the privilege when questioned regarding their whereabouts. This is so because contemnor

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[20] A party who either destroyed or secreted documents subject to a production order under Fed.R.Civ.P. 37(a)(2) would be guilty of obstructing justice, which is punishable by up to five years imprisonment or a fine of not more than $5,000, or both. 18 U.S.C. § 1503.

"might be compelled to convict himself out of his own mouth."[21] 354 U.S. at 128, 77 S.Ct. at 1151-1152.

In this case, Meeks was not adjudged to be in contempt for a failure to answer questions concerning the whereabouts of the records sought by the summons. Instead, he was held in contempt for his failure to produce those records. The Supreme Court impliedly approved such a measure in *Curcio*, when it noted that the petitioner therein "might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*." 354 U.S. at 127 n.7, 77 S.Ct. at 1151 n.7. *Wilson* v. *United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 571 (1911), which involved the commitment of a custodian of corporate records for civil contempt until he purged himself by producing the subpoenaed records, was cited by the Court in *Curcio* for its conclusion that the contemnor could have been proceeded against for failing to produce the records, although not for his refusal to testify concerning their whereabouts.

I conclude that this case is controlled by the decision of this circuit in *United States* v. *Hankins*, 565 F.2d 1344, 1351-52 (5th Cir.), *aff'd on rehearing with additional reasons stated*, 581 F.2d 431, 437 (5th Cir. 1978). "With the fact of noncompliance with the court's previous order clearly and convinc-

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[21] When it stated that the petitioner in *Curcio* "might be compelled to convict himself out of his own mouth," the Supreme Court meant that if he was compelled to testify regarding the whereabouts of the union's records, he might convict himself of obstructing justice and racketeering. 354 U.S. at 121 n.2, 77 S.Ct. at 1148 n.2. *See also* 18 U.S.C. §§ 1503 and 1951.

ingly established, [Meeks'] failure to testify, . . . resting on his Fifth Amendment right not to testify, means that he has failed to show cause why he should not be held in contempt of an outstanding order." 581 F.2d at 437. However, I do recognize that Meeks' commitment for civil contempt would not be indefinite if, as he alleges, he is now truly unable to comply with the court's order to produce the documents and records. As the Supreme Court remarked in *Maggio*:

> "[T]he [contemnor] may be permitted to deny his present possession and to give any evidence of present conditions or intervening events which corroborate him. The credibility of his denial is to be weighed in the light of his present circumstances. *It is everywhere admitted that even if he is committed, he will not be held in jail forever if he does not comply. His denial of possession is given credit after demonstration that a period in prison does not produce the* [*documents*]. The fact that he has been under the shadow of prison gates may be enough, coupled with his denial and the type of evidence above, to convince a court that his is not a willful disobedience which will yield to coercion."

333 U.S. at 76, 68 S.Ct. at 411 (emphasis added).

I would affirm the order of the district court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-2370

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., PLAINTIFFS-APPELLEES

versus

GEORGE W. MEEKS, AS PRESIDENT OF
ST. GEORGE COMPANY, DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion April 17, 1981,
5 Cir., 198—, —— F.2d ——).
(July 10, 1981)

Before CHARLES CLARK, REAVLEY and
WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerre S. Williams
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-79-CA-287

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., INTERNAL REVENUE AGENT

vs.

GEORGE W. MEEKS, AS PRESIDENT
OF ST. GEORGE COMPANY

Filed Nov. 25, 1980

ORDER HOLDING RESPONDENT
IN CONTEMPT

It is hereby ordered, adjudged, and decreed that the respondent, George W. Meeks, as president of St. George Company, is in contempt of this court's order of August 28, 1980, for failing to produce the required information and records as provided therein and that he stand committed to the custody of the United States Marshal until he purges himself of this contempt by complying with this court's order of August 28, 1980, and producing the following records and materials for the Internal Revenue Service:

> The following described books, records, papers, and other data of the St. George Company for

the fiscal years ended June 30, 1977, and June 30, 1978:

1. Corporate minute book;
2. Any and all books and records and statements concerning corporation assets and liabilities;
3. Any and all books and records and invoices concerning corporation income and expenses;
4. All bank statements, cancelled checks and deposit slips from July 1, 1976, through August 31, 1978;
5. All savings account statements and passbooks from July 1, 1976, through August 31, 1978, and
6. Any and all payroll records of salaries of wages paid to officers or employees including cancelled checks and bank statements.

DATED this 25th day of November, 1980.

/s/ D. W. Suttle
Senior United States
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-79-CA-287

UNITED STATES OF AMERICA and
ALBERT RODRIGUEZ, JR., INTERNAL REVENUE AGENT

vs.

GEORGE W. MEEKS, AS PRESIDENT
OF ST. GEORGE COMPANY

Filed Nov. 25, 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING ORDER HOLDING RESPONDENT IN CONTEMPT

On November 25, 1980, hearing was resumed on the court's order for the respondent to show cause why he should not be held in contempt for failure to comply with this court's order of August 28, 1980. After hearing the testimony and evidence, the court makes the following findings of fact and conclusions of law. Any conclusion of law deemed to be a finding of fact is adopted as such. Conversely, any finding of fact deemed to be a conclusion of law is adopted as such.

FINDINGS OF FACT

1. On October 30, 1979, after a hearing, the court entered an order requiring respondent to produce

for the Internal Revenue Service, on November 16, 1979, records and materials requested in the summons that is the subject of this proceeding. The order further provided that, if he failed to comply with the Order, respondent was to appear on December 11, 1979, to show cause why he should not be held in contempt of court.

2. The respondent filed a notice of appeal from this court's order of October 30, 1979. The respondent also filed a motion to stay that order pending a decision by the United States Court of Appeals for the Fifth Circuit.

3. On November 28, 1979, the court signed and entered an order granting respondent's motion for stay pending appeal. On March 11, 1980, the respondent's appeal was dismissed for want of prosecution for his failure to file a timely appellate brief.

4. On August 28, 1980, this court entered an order that provided in part as follows:

> It is, therefore, ORDERED that Respondent, George W. Meeks, produce the following records and materials requested in the summons that is the subject of this proceeding for the Internal Revenue Service on the 6th day of October, 1980, at 9:00 A.M., at the Internal Revenue Service Office at 727 E. Durango Blvd., Room A-210, San Antonio, Texas:
>
> > The following described books, records, papers, and other data of the St. George Company for the fiscal years ended June 30, 1977, and June 30, 1978:
> >
> > 1. Corporate minute book;
> > 2. Any and all books and records and statements concerning corporation assets and liabilities;

3. Any and all books and records and invoices concerning corporation income and expenses;

4. All bank statements, cancelled checks and deposit slips from July 1, 1976, through August 31, 1978;

5. All savings account statements and passbooks from July 1, 1976, through August 31, 1978, and

6. Any and all payroll records of salaries of wages paid to officers or employees including cancelled checks and bank statements.

It is further ORDERED that Respondent is to appear before this Court at 10:00 A.M., on the 10th day of November, 1980, 1980 [sic], unless notified to the contrary prior to such time by the Clerk of the Court, for a hearing to be held for Respondent to show cause why he should not be held in contempt for failure to comply with this order.

5. The hearing on November 10, 1980, was recessed until November 25, 1980.

6. The respondent has failed to produce the records and materials which the court has ordered him to produce.

7. The court has afforded respondent an opportunity to testify during the hearings held on October 30, 1979, on November 10, 1980, and on November 25, 1980. However, respondent has refused to be sworn and to give testimony under oath.

8. The records sought by the Internal Revenue Service exist or were in existence prior to June 12, 1979, the day the Internal Revenue Service Summons was issued.

9. During the direct interrogation of Albert Rodriguez, Jr., Internal Revenue Service Agent on November 10, 1980, by counsel for the government, the following questions were asked in connection with the meeting that took place between respondent and Rodriguez on October 6, 1980:

> Did you ask Mr. Meeks if records were compiled for the St. George Company?
>
> Did you ask Mr. Meeks who prepared the St. George Company records?
>
> Did you ask Mr. Meeks if St. George Company had a general ledger?
>
> Did you ask Mr. Meeks if St. George Company had a cash disbursements journal?
>
> Did you ask Mr. Meeks if St. George Company had a purchaser's journal?
>
> Did you ask Mr. Meeks if St. George Company had payroll records?
>
> Did you ask Mr. Meeks if he had located the St. George Company Corp. minute book?
>
> Did you ask Mr. Meeks whether or not the St. George Company records were on a computer or whether the records were reported manually?

10. The respondent refused to respond to these eight questions on October 6, 1980, and asserted a Fifth Amendment right not to answer Mr. Rodriguez, stating that such testimony might tend to incriminate him.

CONCLUSIONS OF LAW

1. Jurisdiction is proper in this court.

2 Since the respondent has foregone his opportunity to appeal the enforcement order of October 30, 1979, the constitutional validity of that order is no

longer open to question. *United States* v. *Ofe*, 572 F.2d 656 (8th Cir. 1978); *United States* v. *Wodtke*, 543 F.2d 43 (8th Cir. 1976); *United States* v. *Secor*, 476 F.2d 766 (2d Cir. 1973).

3. One who is charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to perform or comply. A court will not imprison a witness for failure to produce documents that he does not have, unless he is responsible for them or is impeding justice by not explaining what happened to them. *United States* v. *Joyce*, 498 F.2d 592, 596 (7th Cir. 1974).

4. An IRS summons imposes a duty to retain possession of summoned documents pending a judicial determination of the enforceability of the summons. Self-induced inability to perform is not a defense to a contempt proceeding. *United States* v. *Asay*, 614 F.2d 655, 660 (9th Cir. 1980).

5. The respondent's failure to present evidence of his inability to comply with the enforcement order is not excused by *Curcio* v. *United States*, 354 U.S. 118 (1957). *See United States* v. *Hankins*, 581 F.2d 431, 437 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

6. The respondent having failed to submit acceptable proof of his claimed inability to comply with this court's order of August 28, 1980, this court has no alternative but to adjudge the respondent in civil contempt.

Dated this 25th day of November, 1980.

/s/ D. W. Suttle
Senior United States
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE OFFICER,

v.

GEORGE W. MEEKS, As President
of St. George Company

ORDER

Upon petition, the exhibits attached thereto, the affidavit of Albert Rodriguez, Jr., Revenue Officer (hereinafter referred to as Petitioner Agent), and upon the Motion of Jamie C. Boyd, United States Attorney, it is

ORDERED that George W. Meeks, as President of St. George Company, (referred to as Taxpayer) appear at the Office of Petitioner Agent, at Room A-210, Federal Building, 737 East Durango Boulevard, San Antonio, Texas, at 9:00 A.M., on September 13, 1979, for the purpose of obeying the summons served upon the said Taxpayer requiring him to appear and give testimony relating to the tax liability or the collection of the tax liability of said Taxpayer and to bring with him all documents and records in his possession or control which are necessary to enable a representative of the Internal Revenue Service to complete his federal tax returns

(a blank federal tax return was attached to the summons to guide the Taxpayer). In the event said Taxpayer fails to appear before the Petitioner Agent at the time and place hereinabove set forth, or fails at such time and place to produce the information and records required by said summons, it is further

ORDERED that the said George W. Meeks appear before the United States District Court for the Western District of Texas, San Antonio Division on the 18th day of September, at 10:00 A.M., and show cause why he failed to appear at the time and place designated in this Order and why he should not be directed to produce the records and documents listed in said Order.

IT IS FURTHER ORDERED that the United States Marshal or Deputy United States Marshal serve this Order on the said George W. Meeks together with the Petition and the exhibits attached hereto.

ENTERED this the 21st day of August, 1979, at San Antonio, Texas.

/s/ D. W. Suttle
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE AGENT

v.

GEORGE W. MEEKS, As President
of St. George Company

AMENDED ORDER

Upon petition, the exhibits attached thereto, the affidavit of Albert Rodriguez, Jr., Internal Revenue Agent, (hereinafter referred to as Petitioner Agent), and upon the Motion of Jamie C. Boyd, United States Attorney, it is

ORDERED, that George W. Meeks, as President of St. George Company, (referred to as Taxpayer) appear at the Office of Petitioner Agent, at Room A-210, Federal Building, 727 East Durango Boulevard, San Antonio, Texas, at 9:00 A.M., on September 13, 1979, for the purpose of obeying the summons served upon the said Taxpayer requiring him to appear and give testimony relating to the tax liability or the collection of the tax liability of said Taxpayer and to bring with him all documents and records in his possession or control which are necessary to enable a representative of the Internal Revenue Service to complete his federal tax returns (a

blank federal tax return was attached to the summons to guide the Taxpayer). In the event said Taxpayer fails to appear before the Petitioner Agent at the time and place hereinabove set forth, or fails at such time and place to produce the information and records required by said summons, it is further

ORDERED that the said George W. Meeks appear before the United States District Court for the Western District of Texas, San Antonio Division on the 18th day of September, at 10:00 A.M., and show cause why he failed to appear at the time and place designated in this Order and why he should not be directed to produce the records and documents listed in said Order.

IT IS FURTHER ORDERED that the United States Marshal or Deputy United States Marshal serve this Order on the said George W. Meeks together with the Petition and the exhibits attached hereto.

ENTERED this the 28th day of September, 1979, at San Antonio, Texas.

/s/ D. W. Suttle
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.,
INTERNAL REVENUE AGENT
PETITIONERS

v.

GEORGE W. MEEKS, As President
of St. George Company
RESPONDENT

ORDER

On the 30th day of October, 1979, came on to be heard the above-entitled and numbered summons enforcement action. Both parties appeared at such hearing, and

It appearing to the Court, after hearing the evidence, that Respondent failed to produce the records and materials sought by the Internal Revenue Service summons, and failed at the hearing to show cause why he should not be compelled to produce such records and documents,

It is, therefore, ORDERED that Respondent produce the records and materials requested in the summons subject of this proceeding for the Internal Revenue Service on the 16th day of November, 1979, at 10:00 A.M., at the Internal Revenue Service Office at 727 E. Durango, Room A-210, San Antonio, Texas.

It is further ORDERED that Respondent is to appear before this Court at 2:00 P.M., on the 11th day of December, 1979, unless notified to the contrary prior to such time by the Clerk of the Court, for a hearing to be held for Respondent to show cause why he should not be held in contempt for failure to comply with this Order.

Entered this the 30th day of October, 1979.

/s/ D. W. Suttle
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 287

UNITED STATES OF AMERICA,
AND ALBERT RODRIGUEZ, JR.

v.

GEORGE W. MEEKS, As President
of St. George Company

DECLARATION

George W. Meeks, the respondent, declares

I have provided the Internal Revenue Service, in the person of Mr. Albert Rodriguez, such records of the St. George Company as are covered in the administrative summons and the ensueing Court Order as are in my possession.

The St. George Company, a corporation under the laws of the state of Texas conducted business from August 1976 through June of 1977 only. There are, therefore, no corporate records for time periods prior to, or subsequent to those dates.

I do not have in my possession or control any of the books, records, or papers of the St. George Company which are called for in the summons and court order in question; other than those which have already been submitted to Mr. Rodriguez. Further, I must respectfully decline to answer any further questions concerning these documents, on the advise of Counsel, on the grounds that the answers to such

questions may tend to incriminate me and are thus privileged under the Fifth Amendment to the Constitution of the United States.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

/s/ George W. Meeks
GEORGE W. MEEKS
Respondent

★ U. S. GOVERNMENT PRINTING OFFICE: 1981 [illegible] 709